



Senate
Research
Center

ISSUES FACING

THE

79TH TEXAS LEGISLTURE



Sam Houston Bldg.
Suite 575
P.O. Box 12068
Austin, Texas 78711
512 • 463 • 0087
Fax: 512 • 463 • 1271
Dial 711 for Relay Calls

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ISSUES FACING THE 79th TEXAS LEGISLATURE

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The following information is intended to serve as a reference guide to issues facing the 79th Legislature. It is not a comprehensive list of issues, but rather an outline of broad categories and topics of concern that have arisen during the interim. This is not intended to function as an endorsement of any issue by the Senate Research Center.



Senate Research Center

The following staff contributed to this report:

Gina Martin, Director

Dunya Bean
Candy Black
Lisa Conley
Betsy Heard
Chloe Johnson
David Mauzy
Samm Osborn
Jessica Smith
Sharon Weintraub

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BUDGET

The 2006-2007 Biennial Revenue Outlook

In accordance with Article III, Section 29a, of the Texas Constitution, in January 2005, the Comptroller of Public Accounts (comptroller) will issue the Biennial Revenue Estimate (BRE) Report (79th Texas Legislature, 2006-2007) that presents the revenue estimate for the remainder of fiscal year (FY) 2005 and projects the anticipated revenue available for the 2006-2007 biennium. The BRE provides the framework for determining the amount of money the legislature will be able to appropriate for the biennium.

In a September 23, 2004, press release, Comptroller Carole Keeton Strayhorn announced that "due to a rebounding state economy, a successful comptroller tax amnesty program and strong tax collections from oil and gas companies, Texas' general revenues finished fiscal 2004 \$1.8 billion higher than in 2003." The press release went on to state that FY 2004 general revenues increased by 6.4 percent over FY 2003 general revenues, the highest growth rate since FY 2001. While major indicators point to the possibility of even stronger growth in coming months,¹ Strayhorn cautioned against any premature revision of the revenue estimate.

The vast majority of general revenue (GR) will come from sales taxes. Other major sources of GR and GR-dedicated revenues are: motor vehicle sales taxes, franchise taxes, natural gas taxes, insurance premium taxes, tobacco settlement proceeds, and lottery proceeds.

Synopsis of the Budgets: Fiscal Year 2003 and Fiscal Years 2004-2005

In January 2003, the comptroller announced that in the absence of action by the 78th Legislature, Regular Session, there would be \$7.4 billion less in GR funds available for the 2004-2005 biennial budget than was available for the 2002-2003 biennial budget, including a \$1.8 billion shortfall in GR funds for the second year of the 2002-2003 biennium. Based on certain assumptions regarding spending needs made by the comptroller, coupled with revised revenue projections between the biennia, the comptroller told the 78th Legislature, Regular Session, that legislators would be facing a total deficit of \$9.9 billion.

In response to the estimated shortfall in GR funds for the 2004-2005 biennium, the 78th Legislature, Regular Session, took a three-pronged approach that entailed reducing the FY 2003 budget; reducing the 2004-2005 biennial budget and making concomitant policy

¹ Source: Texas Economic Update, Fall 2004, Texas Comptroller of Public Accounts.

changes; and taking actions to increase the amount of GR funds available for appropriation.

Fiscal Year 2003 Budget Reductions

In January 2003, the governor, lieutenant governor, and speaker of the house directed all state agencies and institutions of higher education to reduce FY 2003 GR and GR-dedicated expenditures by seven percent. This budget reduction plan led to the enactment of H.B. 7, 78th Legislature, Regular Session, that provided for \$1.4 billion in savings from GR and GR-dedicated funds. In addition, H.B. 7 appropriated \$450 million from the Economic Stabilization Fund (ESF or "Rainy Day Fund") to alleviate the budget shortfall for FY 2003.

Fiscal Year 2004-2005 Budget Reductions and Policy Initiatives

In the effort to align the 2004-2005 budget with reduced available revenues, the 78th Legislature, Regular Session, instructed all agencies and institutions of higher education to prepare a modified legislative appropriation request (LAR). These modified LARs provided agencies and institutions of higher education with a baseline amount (known as the Initial Relevant General Revenue Amount (IRGRA)) that was 87.5 percent of their 2002-2003 appropriation levels. Beginning with the newly calculated IRGRA, agencies were directed to prioritize their budgetary needs into "building blocks," integrating program and service needs. Agencies were allowed to request additional funds above the IRGRA, if the agency determined that there was a need. The 2004-2005 General Appropriations Act passed by the legislature totaled \$2.6 billion less in GR funds than the 2002-2003 biennial spending level. In addition to the reductions in expenditures, the 78th Legislature appropriated an additional \$811 million from the ESF (H.B. 7, 78th Legislature, Regular Session), initiated program policy changes, and reorganized numerous state agencies. For example, H.B. 2292, 78th Legislature, Regular Session, consolidated 12 health and human services agencies into five agencies and was estimated at that time to produce a savings of \$1 billion for the 2004-2005 biennium.

Revenue Changes and Other Actions

The 78th Legislature acted on a number of measures to increase available GR funds for the 2004-2005 biennium, including consolidating funds into the GR fund; extending an assessment on telecommunications; creating a tax amnesty program; closing certain tax loopholes; maximizing returns from the Permanent School Fund; and authorizing the state's participation in a multi-state lottery. These actions increased the amount of GR funds available for appropriation by \$1.8 billion for the biennium.

Federal Action

In May 2003, the federal government enacted a state fiscal relief package. Texas received an additional \$1.3 billion for use during FY 2003 and the 2004-2005 biennium.

H.B. 1, General Appropriations Act, 78th Legislature, Regular Session

The 78th Legislature appropriated \$118.2 billion in all funds for the 2004-2005 biennium, an increase of \$2.5 billion, or 2.2 percent over the estimated expenditures for the 2002-2003 biennium. The all funds budget includes GR funds, GR-dedicated funds, federal funds, and other funds (i.e., State Highway Fund 0006), trust funds, bond proceeds, interagency contracts, certain revenue held in higher education accounts, and certain constitutional funds.

Fiscal Year 2006-2007 Biennial Budget Instructions

On June 16, 2004, the Legislative Budget Board (LBB) and the Governor's Office of Budget, Planning, and Policy (GOBPP) issued a memorandum detailing instructions for agency and institution of higher education LARs for the 2006-2007 biennium.

Under the instructions set forth in that memorandum, an agency's or institution of higher education's baseline budget request for GR funds and GR-related funds must be limited to 95 percent of expenditures in FY 2004 and budgeted amounts in FY 2005. All requests are to include amounts necessary to maintain a constitutional school finance system and to meet current statutory requirements, satisfy the debt service requirement for existing bond authorizations, and maintain current caseloads for federal entitlement services.

Funding requests above the baseline level may not be included in the agency's baseline request, but may be submitted as exceptional items. The administrator's statement accompanying the budget request identifies which exceptional items are associated with attaining 100 percent of the 2004-2005 appropriation level.

In September 2004, the Senate Finance Committee began hearing testimony regarding agency and institution of higher education LARs. The Senate Finance Committee LAR hearings concluded on November 9, 2004.

Factors Affecting Spending

Other than available revenues, as described above, the Texas Constitution contains four limits on spending. A brief description of each of the four constitutional spending limits follows.

Pay-As-You-Go Limit

Article III, Section 49a, of the Texas Constitution prohibits the legislature from appropriating more revenue than will be collected during the biennium unless approved by a four-fifths vote of each house. Under the Tax Relief Amendment of 1978, the growth of appropriations from state tax revenues not dedicated by the constitution is limited to the estimated growth of the state's economy.

Once an appropriations bill is passed by the legislature, the comptroller must determine if anticipated revenue will be sufficient to cover appropriations. If the comptroller determines that the appropriations bill is within the constitutional limit, the bill is certified and sent to the governor for approval. If the comptroller determines that the bill appropriates more than the amount of anticipated revenue thus exceeding the constitutional limit, the bill must be returned to the house in which it originated, where steps may be taken to bring the appropriations within the amount of anticipated revenue.

Welfare Spending Limit

Article III, Section 51-a, of the Texas Constitution provides that the amount that may be expended from funds for assistance grants to or on behalf of needy dependent children and their caretakers (Temporary Assistance for Needy Families, or TANF) shall not exceed one percent of the state budget in any biennium.

Limit on the Growth of Certain Appropriations (Spending Limits)

The Texas Constitution, under Article VIII, Section 22, limits the biennial rate of growth of appropriations from state tax revenue not dedicated by the constitution to the estimated rate of growth of the state's economy. The LBB adopts items of information, which include: the estimated rate of growth of the Texas economy as measured by personal income; the 2004-2005 level of appropriations supported by the state tax revenue not dedicated by the constitution (the base biennium); and the limit on appropriations or the constitutional spending limit for the 2006-2007 biennium. The limit on appropriations for the 2006-2007 biennium is determined by multiplying the 2004-2005 base budget by the growth of Texas personal income from the 2004-2005 biennium to the 2006-2007 biennium.

On November 17, 2004, the LBB established the following elements of the Article VIII spending limit:

- An 11.34 percent rate of growth of personal income from the 2004-2005 to the 2006-2007 biennium;

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- A base level of total appropriations of \$46.8 billion, supported by tax revenue not dedicated by the constitution, for FY 2006-2007; and
- A limit of \$52.1 billion of appropriations supported by tax revenue not dedicated by the constitution for the 2006-2007 biennium.

The appropriation levels may be adjusted based on actual expenditures for the current biennium and the comptroller's BRE.

State Indebtedness

Article III, Section 49-j, of the Texas Constitution, provides that the maximum annual debt service in any fiscal year on state debt payable from the GR fund may not exceed five percent of an amount equal to the average of the amount of GR fund revenues, excluding revenues constitutionally dedicated for purposes other than payment of state debt, for the three immediately preceding fiscal years. Bonds and agreements initially required to be repaid from GR funds would be subject to the debt ceiling provision if GR funds were subsequently needed to repay the obligations.

Revenue Options

The governor, lieutenant governor, and speaker of the house have directed the 79th Legislature to consider changing the structure of funding public education as a priority issue. With a goal of reducing local property taxes as the major source of revenue for funding public education and shifting to increased state funding, several revenue options may be considered to supplant a portion of the maintenance and operation portion of the local property tax levy, which raised \$16.1 billion in FY 2005. Following are a number of options available to the 79th Legislature to raise additional state revenues. The ultimate fiscal implications of the possible alternatives will depend on a number of variables including the final language of the legislation passed, enforcement, taxpayer compliance, effective dates of legislation, and taxpayer discounts.

Note: All fiscal estimates have been provided by the Office of the Comptroller of Public Accounts.

General Sales Tax

There are two methods of increasing state revenues through the sales tax: increasing the rate by some percentage above the current state rate of 6.25 percent or expanding the sales tax base. These two methods may be exclusive of one another or may be combined. Additional state revenue could be generated simply by increasing the rate on those items and services currently subject to the state sales tax. The comptroller estimates that for

every one percent increase in the sales tax rate on the current base, additional revenues of approximately \$1.9 billion would be raised per year.

Sales tax revenues can also be increased by expanding the base. Generally, expanding the base involves repealing exemptions and/or adding those items and services that are currently excluded. Exemptions are generally defined as protections on items that would be taxable except for specific provisions in the law. Exclusions refer to those transactions that are not taxed because they fall outside the general legal definition of a taxable sale. Texas law requires the comptroller to provide estimates on exemptions and exclusions prior to each regular legislative session.

Motor Vehicle Sales Tax

The comptroller estimates that increasing the motor vehicle sales tax by one percent above the current 6.25 percent will result in added revenues of approximately \$393 million per year.

Tobacco Tax Increase

Currently, Texas' cigarette tax is \$0.41 cents per pack. The 79th Legislature may consider the most common proposal of raising the cigarette tax rate by \$1.00 per pack. The comptroller estimates that this would raise additional revenue of approximately \$1.5 billion per biennium. In addition, proposals to increase taxes on cigars and smokeless tobacco products have been discussed. The revenues raised on those items would depend on the percentage increase in the rate. Also, additional tobacco revenue could be realized by requiring non-participating tobacco manufacturers to participate in the tobacco settlement with Texas.

Business Taxes

Texas taxes business activity through the franchise tax. The Delaware sub-structure issue and the "Geoffrey Loophole" involve changes to the franchise tax to capture additional revenue. The business activity tax (BAT), gross receipts tax, and payroll tax proposals deal with new business tax scenarios; if any one or a combination of the proposals were adopted it would most likely replace the current franchise tax.

Delaware Sub-Structure Issue

The Delaware sub-structure is a complicated corporate structure which includes limited partnerships as a vehicle for Texas companies to avoid paying the state franchise tax. This structure provides for the routing of income out of state and then back into Texas, tax-free. Companies in Texas have inserted limited partnership into their corporate structures to avoid the franchise tax. The comptroller estimates that closing the Delaware

sub-structure loophole would yield an average of approximately \$300 million a year, but would have to be closed in conjunction with the "Geoffrey Loophole" described below.

"Geoffrey Loophole"

The "Geoffrey Loophole," named after the familiar giraffe mascot of Toys "R" Us, is a method used by companies to reduce their franchise tax liability by diverting money to an out-of-state sister company that holds rights to the use of trademarks and other intangibles by charging fees to the Texas company. The comptroller estimates that closing the Geoffrey loophole would provide the state with approximately \$130 million per year in available revenue, but would have to be closed in conjunction with the Delaware sub-structure loophole, described above.

Business Activity Tax (BAT)

While there is no single, uniform definition of a BAT, generally it is assumed that a BAT is the privilege of doing business in a state or earning income from within a state. To many, the BAT structure refers to a tax structure that resembles the Michigan single business tax. This type of tax is usually considered a "value-added" tax structure, defined as taxes levied on a service consumed or a benefit received principle. The BAT could be assessed on the value-added by each company, incorporated or not, that does business in Texas. The tax can be computed on gross receipts minus payments to other businesses, or as the sum of profits, depreciation, and employee compensation. The comptroller estimates that a BAT, imposed at a rate of one percent, less certain exemptions, would generate approximately \$3.2 billion in revenue per year. (Note: A BAT-style tax was proposed by then-Governor Bush in the introduced version of H.B. 4, 75th Regular Session.)

Gross Receipts Tax

A gross receipts tax would assess a fixed percentage on total business gross receipts. The comptroller estimates that Texas businesses generate approximately \$1 trillion per year in gross receipts.

Payroll Tax

A payroll tax could be used to generate state revenue by assessing a simple or variable percentage on total Texas' business gross payroll. The tax could include a cap on the amount assessed per employee. The comptroller estimates that the total Texas business payroll is approximately \$300 billion per year.

Other Revenue Options

State Property Tax

A state property tax could be adopted in lieu of a designated amount of local property taxes assessed on business and residential property. The rate and appraisal process would be determined by the legislature.

Video Lottery Terminals (VLTs)

The VLT proposal would allow for the installation of VLTs at 13 locations across the state, tied to pari-mutuel tracks and Indian reservations. The most likely scenario would provide for owner-operated models. The comptroller estimates that upon full implementation of approximately four years, the state would realize approximately \$1 billion per year, assuming an estimated 35 percent state take.

Catalog/Internet Sales

The comptroller's office has estimated that Texas lost approximately \$441 million in catalog and Internet sales tax for FY 2005. The United States Congress would have to act to make these funds available to the states. The estimates above are provided for informational purposes only.

Economic Stabilization Fund (ESF) or "Rainy Day" Fund

The ESF, or rainy day fund, is a funding source available for appropriation by the legislature. Several provisions dictate the amounts deposited into the ESF. The legislature may appropriate amounts from the ESF at any time and for any purpose by a two-thirds vote of the members present in each house. Discussions regarding changes to the ESF have included: instructing the comptroller to reduce, from available general revenue in the BRE, an amount equal to the amount appropriated from the ESF in the current biennium, and to transfer the corresponding amount back to the ESF in the current biennium to the extent that funds are available or the next biennium; changing the methodology by which the balance transfer is calculated to one-half of any positive balance in the general revenue account within the General Revenue Fund 0001, without regard to encumbrances; and encouraging the growth of the ESF to a minimum of five percent of the state's general revenue budget. According to the comptroller, a \$3 billion reserve would be equivalent to five percent of the current general revenue budget.

Tax Administration

Taxpayer Records

In an informal letter ruling from Texas Attorney General Greg Abbott, the comptroller has been instructed that taxability rulings and tax decision are public under Section 552.025 (Tax Rulings and Opinions), Government Code. This ruling reversed prior rulings to the effect that taxability rulings and tax decisions are protected in part under Section 111.006 (Confidentiality of Information) of the Texas Tax Code.

Excess Refunds

The 78th Legislature, Regular Session (General Appropriations Act, Fiscal Programs-Comptroller of Public Accounts, Rider 11), prohibited the comptroller from issuing tax refunds in excess of \$250,000 to an individual or entity in the aggregate. Current law provides that the legislature will have to appropriate funds for such refunds.



BUSINESS and COMMERCE

Usury

The Texas Constitution has long provided protection to debtors, beginning with homestead protection provisions in the constitution drafted by the founders of the Republic of Texas in 1836. In 1960, voters approved a constitutional amendment which set a maximum consumer interest rate of 10 percent, in an effort to protect borrowers from usury, while permitting the legislature to set classes of loans for which the maximum rate may exceed 10 percent. Only five states (Arkansas, California, Oklahoma, Tennessee, and Texas) address usury through their state constitution; most states regulate interest rates statutorily.

As banking and credit transactions have become more complex, and the use of credit cards has become more widespread, many business people and regulators fear that Texas' consumer protection laws have become outdated and that their complexity impedes economic development.

Federal law, particularly the doctrine of exportation, preempts many Texas statutes. The doctrine of exportation allows any interest rate permitted in a lending institution's state of domicile to be imported to Texas. The experience of Texas consumers with the two most common types of credit accounts (i.e., charge accounts offered by department stores) and revolving accounts (i.e., credit cards), demonstrate this practice. Most credit cards are now issued by banks domiciled in Delaware, South Dakota, and Oklahoma. Only two stores in Texas operate their own charge accounts; other stores affiliate their accounts with out-of-state banks and import those institutions' rates into Texas.

The Independent Bankers Association of Texas and the Texas Bankers Association have testified before legislative committees that the state's usury laws and regulatory burden have decreased the willingness of Texas-based banks to issue credit cards and have hurt Texas banks by limiting their involvement in international banking.

The legislature may act to loosen or abolish the state's usury provisions and to adopt the federal definition of "interest" to provide clarity and consistency.

Unemployment Compensation

The state's unemployment insurance (UI) program is overseen by the Texas Workforce Commission under Title 4, Subtitle A, Texas Labor Code (the Unemployment Compensation Act).

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According to a report by the National Employment Law Project (*The Texas Unemployment Insurance System: Barriers to Access for Low-Wage, Part-Time and Women Workers, 1999*), Texas, at 22.3 percent, ranks eighth lowest among the states for the percentage of residents receiving unemployment compensation.

The 78th Texas Legislature, Regular Session, enacted seven bills relating to unemployment compensation insurance, ranging from a measure mandating UI fraud detection and collection strategies to a measure adding a new subchapter to the Labor Code relating to the issuance of financial obligations for the unemployment compensation fund.

Ongoing issues for the state's UI program include fully leveraging federal funds and strengthening the UI trust fund to recover unemployment benefit overpayments. While the state has tools to compel businesses to pay amounts due the state, it lacks the means to compel individuals to repay excess or erroneous UI benefit payments.

In addition, federal legislation passed in August 2004, by Congress requires states to close loopholes that now allow some employers to dodge UI taxes. Through a practice called state unemployment tax act dumping (SUTA dumping), some employers have been able to lower their unemployment taxes by shifting their payrolls to a new corporation or by buying a different firm and using that company's lower tax rate, thus "dumping" their original higher rate. North Carolina, Arkansas, Maine, and Washington are among the states that have recently made it a felony criminal offense for any person to try to SUTA dump or for a tax advisor to help a company SUTA dump.

An issue indirectly related to UI is that of worker training. The state's Skills Development Fund, comprised of \$12.5 million annually in general revenue, provides grants to business consortiums, in collaboration with community colleges, to help workers upgrade their skills in order to move into higher-level jobs, to train new workers, or to retrain unemployed workers. Grant requests currently exceed available revenue by about a three-to-one ratio.

The legislature may consider legislation to comply with federal mandates on SUTA dumping and to compel repayment of claim overpayments. The legislature may also consider increasing the Skills Development Fund.

S.B. 7

Prior to 1999, the Public Utility Commission (PUC) was authorized to regulate the electricity market and ensure that only one electric energy provider served each area of the state. The 76th Legislature enacted S.B. 7 to restructure the electric utility industry by deregulating the electricity generation market and permitting certain providers to compete for customers. Effective in January 2002, retail customers (i.e., individuals,

small businesses, and large businesses) served by investor-owned utilities were able to choose their electricity provider. Customers of electric cooperatives and municipally-owned utilities that had not opted for customer choice were not eligible to choose an alternate provider.

In order to provide protection to consumers during the transition to a deregulated market, S.B. 7 provided that all electric rates charged by investor-owned utilities were to be frozen from September 1, 1999, until January 1, 2002. After January 1, 2002, consumers were to receive a six percent reduction in their rates, which then became the "price to beat" (PTB). PTB is to serve as both a ceiling and a floor for electricity prices, acting as a floor from 2002 to 2005 and as a ceiling until 2007.

S.B. 7 also set forth other consumer safeguards, including bans on unauthorized switching of electricity providers (known as "slamming") and unauthorized charges in electric bills ("cramming") and consumer education programs. The bill also established a goal of 10 percent annual growth in demand for alternative energy efficiency programs.

The Electric Reliability Council of Texas (ERCOT) was charged with administering the state's power grid, serving seven million customers and overseeing the operation of over 78,000 megawatts of generation and 38,000 miles of transmission lines. ERCOT serves approximately 85 percent of the state's electric load and 75 percent of the geographic land area in Texas.

The past year has brought to light significant problems with the management of ERCOT, including inadequate personnel oversight; alleged criminal violations of contracting ethics; violations of ERCOT's Code of Conduct; and poor communications between ERCOT and the Public Utility Commission (PUC) and between ERCOT and the legislature.

The legislature may consider proposals to recreate the current 17-member ERCOT board as an independent nine-member body appointed by the governor; implement claw-back provisions (mutually agreed upon provisions directing a company to repay a portion of incentives granted if they did not meet the performance standards set down) for residential and small commercial customers; restructure ERCOT management; and ensure that safety protocols are in place against terrorist threats.

Property and Casualty Insurance Reform and Mold Remediation Measures

The 78th Legislature, Regular Session, enacted measures to reform the state's property and casualty insurance industry, alleviate rapidly increasing insurance rates, and regulate mold assessors and mold remediators (S.B. 14, S.B. 127, and H.B. 329).

The Property and Casualty Insurance Legislative Oversight Committee (committee) was charged with monitoring the effects of this legislation on the homeowners insurance market. Commissioner of Insurance Jose Montemayor has reported that rate reductions ordered by the Texas Department of Insurance (TDI) pursuant to S.B. 14 have been adopted by all except two companies. Those companies, the two largest in the state, have resisted the TDI-ordered reductions and, in early November 2004, won a district court judgment that the procedures used by the state to order the reductions violated their right to due process.

The state has appealed the ruling, and Governor Perry has warned insurers that he and the legislature will take further action to force rate reductions.

Montemayor testified before the committee in October that while rates have been reduced for most homeowners, many homeowners have not seen a reduction in their premiums due to an inflationary spiral in new construction and increasing appraisal values of existing property.

As part of the legislature's efforts to reduce homeowners' insurance rates, H.B. 329 enacted Chapter 1958 (Mold Assessors and Remediators), Occupations Code, to regulate mold assessment and remediation activities. The Texas Department of Health (now the Texas Department of State Health Services) was given regulatory authority and charged with establishing education, enforcement, and performance standards; levying license, registration, and examination fees; and conducting inspections, investigating complaints, and overseeing licensees.

S.B. 127 set forth restrictions on the use of claims history for water damage to protect persons and property from being unfairly stigmatized in obtaining residential property insurance based on their filing of a water damage claim or claims under a residential property insurance policy. The bill set forth provisions for the regulation of water damage claims handling procedures, authorized the commissioner of insurance to regulate certain aspects of water damage claims, and established provisions for the licensure and practice of public insurance adjusters regarding water damage claims.

During hearings mandated by its oversight of the property and casualty insurance legislation, Senate Business and Commerce Committee members expressed concern that Texas might be at risk from multiple high wind storms, noting that Florida was hit by four hurricanes in the 2004 hurricane season.

ISSUES FACING THE 79TH TEXAS LEGISLATURE

The 79th Legislature may consider imposing additional penalties for insurers that do not comply with state-ordered rate reductions; adopting legislation to address wind exposure risk management; and adjusting credit scoring models.



BORDER AFFAIRS

Border Security

The Governor's Office of Texas Homeland Security (THS) addresses border issues related to homeland security and coordinates with federal agencies on homeland security programs. The United States Visitor and Immigration Status Indicator Technology (US-VISIT) program, a federal initiative, has generated controversy and raised concerns among the mayors of Brownsville, Laredo, and El Paso, along with residents, business owners, and civic leaders in those communities.

To alleviate the problems of congestion, the downturn in tourism, and a loss of commercial revenue associated with increased border security checks, the time limit for visitors was recently increased from 72 hours to 30 days, but the 25-mile limit for international visitors under the US-VISIT program remained the same. Border officials at Senate International Relations and Trade Committee (IRT) meetings voiced the need for parity so that travelers, personal and commercial, from Mexico are treated similarly to those who enter the United States from Canada. While federal funds for the United States Border Patrol and inspection personnel, including customs officers, have been added, the 79th Texas Legislature may face funding issues related to the implementation of federal mandates associated with border security.

Various state agencies, including the Texas Department of Public Safety (DPS) and the Texas Department of Transportation (TxDOT), face increased costs related to homeland security and other federal mandates.

The legislature may address issues related to the use and distribution of federal funds and the development of a tracking system to ensure appropriate allocation and efficient use of such funds. The legislature may also consider improvements in federal, state, and local shared communication networks that allow early detection and reporting of homeland security incidents, as well as new technologies and the costs to implement a statewide communication network.

Border Environmental Affairs

The Rio Grande River, water allocations, and air and water pollution along the border continue to be monitored by the legislature. Federal funds allocated via the North American Development Bank (NADBank), the United States Environmental Protection Agency (EPA), and the Border Environment Infrastructure Fund (BEIF) have resulted in 39 certified projects in Texas related to water and wastewater, solid waste, and water conservation. The BEIF administers grants from other institutions that can be combined

with loans and guaranties to facilitate project financing in conjunction with EPA funds. The primary objective of BEIF is to assist communities in transitioning from subsidized projects to self-sustaining projects supported locally by user fees and other revenues. Only water and wastewater infrastructure projects located within 100 kilometers (62 miles) of the United States-Mexico border will be considered for funding. Projects must be certified by the Border Environment Cooperation Commission (BECC) and meet other criteria, including human health and ecological issues, community infrastructure, and priorities stressing funding availability.

According to BECC, in addition to the 39 certified projects, an additional 23 Texas projects are underway. The projects, those certified and under serious consideration, include potable water, wastewater, solid waste, and water conservation. The lack of adequate funding for BEIF assistance has necessitated the prioritization of these programs, working with the EPA and the NADB and other stakeholders. The emphasis will be on human health and the environmental impact along the border area.

The 79th Legislature may consider funding an additional \$1.5 billion for completion of these and other projects on the border.

Imports/Exports

H.B. 109, 78th Legislature, Regular Session, amended procedures under which licensed custom brokers operate to correct certain deficiencies and to ensure that the state properly collects the requisite taxes. The bill allowed the state to strengthen the system for validating export certification documents. According to some border officials, the comptroller does not have the necessary personnel to continually audit both the Texas customs brokers who are licensed to prepare, issue, and/or sign validated export certifications forms or the department stores that receive these certifications. The 79th Legislature may review the procedures for issuing and auditing export certifications so that sales tax revenues are not lost to the state.

Colonias

Nearly half a million people live in hundreds of "colonias" near the Texas-Mexico border. Colonias are subdivisions or neighborhoods that have substandard or no running water, sewers, electricity, or paved roads. Over the past fifteen years, the Texas Legislature has attempted to address colonia issues, including placing restrictions on contracts for deed. The Health and Human Services Commission (HHSC), began a colonias initiative in September 2000, based on a coordinated, interagency system of providing services and training to colonia residents which targets eleven colonias.

Sixteen community resource centers (CRCs), located in selected colonias, serve as centers for service delivery and training. Texas A&M University also operates a program

of "promotoras," colonia residents who are employed by the CRCs who act as liaisons between the colonia residents and service providers.

The 79th Legislature may consider issues relating to the continuation or expansion of the colonias initiative including expanding the volunteer coordinator program; expanding the partnership model to colonias that are less well-developed and continue to lack running water, sewage systems, paved roads, and other services for a safe and healthy living environment; reconfiguring promotoras to enable them to reach residents of colonias that lack CRCs; expanding CRCs participation in food bank activities and transportation services; addressing access to medical services for residents who lack insurance or the ability to pay; and refining mechanisms to aid residents in applying for state and federal assistance programs.

The 79th Legislature may also consider issues relating to establishing stable funding sources for promotoras and other colonias initiatives.

The 77th Legislature authorized the issuance of \$175 million in bonds and notes to pave roads for colonias. To date, TxDOT has issued two \$50 million program calls. The 79th Legislature may consider additional funding for transportation infrastructure needs in colonias.

Border Health

Issues that significantly affect the health of individuals and communities in the border region include access to primary care or basic health care services; cancer mortality rates; the mortality and incidence of diabetes; reducing obesity rates, particularly among children; environmental health; immunization coverage for young children, as well as reducing the incidence of hepatitis and tuberculosis; and reducing infant mortality due to congenital defects, and improving prenatal care and teenage pregnancy rates.

The Texas Department of Health (now the Texas Department of State Health Services) established an Office of Border Health in Laredo, El Paso, Uvalde, and Harlingen to give increased attention to the unique health problems of border communities and their citizens.

Given the rapid population growth along the border and the infrastructure needs in this area, the 79th Legislature may review means through which border health issues can be addressed. Issues that may be addressed include identifying and implementing best practices in the recruitment and retention of students in health care programs that target practice in rural and border areas; establishing a program to encourage the training, recruitment, and retention of health care professionals and practitioners in health professional shortage areas in the border region; establishing pilot programs to provide mentoring opportunities in health science technology and related courses for secondary

school students in the border region; establishing science instruction programs for students in underserved areas; establishing grant or loan repayment assistance programs to encourage health care practitioners to relocate or establish practices in the border region; and establishing research programs in the border region that focus on health issues such as asthma, obesity in children, and diabetes.



HEALTH AND HUMAN SERVICES

Childhood Immunizations

Raising immunization levels for Texas children and the elderly is one of the highest priorities for the Department of State Health Services (DSHS). According to the 2003 National Immunization Survey (NIS), 78.1 percent of Texas children, ages 19 months through 35 months, were fully vaccinated. Although this is the highest level Texas has ever achieved, the state ranks 41st among the 50 states.

Texas was one of only two states that passed laws in 2003 to change immunization exemptions. Meningitis and immunizations for college students continue to be a hot topic, as does the inclusion of Hepatitis A and B immunizations as a public school requirement. State legislatures across the nation have addressed public health threats with legislation regarding smallpox and first respondent vaccinations.

Although childhood immunizations are considered one of the most successful public health interventions of the last century, high prices and liability issues remain a concern. According to the National Conference of State Legislatures, the recommended childhood immunization schedule, which includes more than 20 shots during the first two years of a child's life, costs \$750 per child for private providers to buy the vaccines. While the costs are less for public providers and states cover only five percent of the total costs, states like Texas that have rapidly growing child populations are facing increasing costs because federal programs do not cover all children, so the state must supplement these funds.

The federal Vaccines for Children Program (VFC) provides free vaccines for children who are uninsured, Medicaid-eligible, underinsured (if receiving immunizations in a federally qualified health center or rural health clinic), Native American or Alaska Native. Section 317 is another federal program administered by the Centers for Disease Control (CDC) and provides grants to states and territories, commonwealth trusts, and cities for vaccine purchase and outreach and disease surveillance programs.

The National Vaccine Advisory Committee (NVAC) has identified several key barriers to timely vaccinations, including poverty, lack of insurance or being underinsured, and the knowledge, beliefs, and attitudes of parents. NVAC also recognized that certain provider practices contribute to under-vaccination including lack of notification or recall systems, inability to track and identify under-vaccinated children, and failure to adequately assess immunization status at all visits.

Vaccine schedules and recommendations are increasingly complex, and state officials and legislators must find ways to balance the need to protect public health, provide sufficient resources to provide access to the recommended vaccines, and address the concerns of citizens who object to immunization mandates.

During the 79th legislative session, legislators may address immunization-related legislation on topics including increasing or decreasing the exemptions; modifying the state's registry; long-term care mandates; funding; insurance mandates; meningitis and smallpox; and school-aged vaccination requirements.

Clinical Trials

Research studies on human patients to test the safety and effectiveness of new treatments, also called clinical trials, offer patients access to potentially life-saving new drugs. Such trials have been particularly useful in developing treatments for diseases like cancer where, for example, 60 percent of all children with cancer are enrolled in some kind of clinical trial.

Generally, the health care related costs in a clinical trial (for tests, drugs, and any related research activity) are covered by the trial sponsor, usually a pharmaceutical company or a research entity such as the National Cancer Institute. Private health insurance coverage may or may not cover associated costs for routine patient care, such as doctor visits, tests, and x-rays.

Clinical trials may represent an important therapeutic option for patients and an essential tool in advancing medical knowledge. Lack of insurance coverage may be a barrier to patients who might otherwise participate; however, additional insurance costs, like other mandated benefits and services, may result in higher insurance premium rates.

Twenty-one states have passed legislation, issued state requirements, or entered into agreements that require health plans to cover the costs of routine medical care for patients who are participants in clinical trials.

The 79th Legislature may consider issues relating to clinical trials and health insurance coverage for persons participating in such trials.

Methamphetamine Laboratories Along the Texas/Oklahoma Border

Methamphetamine abuse is a serious and growing problem throughout the United States. Methamphetamine is a highly addictive central nervous system stimulant that is easily produced in home laboratories using inexpensive, over-the-counter ingredients, especially pseudoephedrine and ephedrine products. Initially, it was prescribed for weight loss or used to help people stay alert, and while those uses continue, its abuse has become a

growing problem. According to the 2001 National Household Survey on Drug Abuse, 4.3 percent of the United States population (9.6 million people) reported trying methamphetamine at least once, with the highest usage rates among the 18-to-25-year-old age group.

Law enforcement agencies have focused on the illegal production, trafficking, and distribution of methamphetamine. Methamphetamine labs also pose a health threat to people who are exposed to them, especially children. In addition to the dangers of exposing children to the precursor chemicals and the vapors from mixing and boiling these products, methamphetamine-addicted parents may be abusive toward and neglectful of their children. Children from these homes may experience psychological and emotional trauma from interaction with law enforcement, and from displacement from their homes into foster care if their parents enter the criminal justice system.

Methamphetamine has toxic effects and the damaging effects of long-term methamphetamine abuse include addiction, anxiety, violent behavior, insomnia, and confusion. Chronic abusers can also display a number of psychotic features, including auditory hallucinations, paranoia, delusions, mood disturbances, and suicidal as well as homicidal thoughts. Like other needle injecting drugs, there is also the potential for HIV and Hepatitis B and Hepatitis C transmission. Although the physical manifestations of a withdrawal for a chronic user are not as visible as with other addictive drugs, more severe psychological symptoms can occur when use is stopped.

Fetal exposure to methamphetamine during pregnancy can result in increased rates of premature delivery, prenatal complications, and altered neonatal behavioral patterns, such as extreme irritability and abnormal reflexes.

Unlike many other illicit drugs, methamphetamine is not usually bought and sold on the streets. Methamphetamine sales are typically less visible exchanges prearranged by "networking" with producers. Due to the availability of the precursors and the ease of obtaining recipes and supplies from the Internet, many users simply make their own product at home. Uncertainty about the drug's sources and the pharmacological agents used to produce it make it extremely difficult to determine its toxicity and resulting symptoms and consequences.

The processes and chemicals used are readily available, inexpensive materials. The one ingredient that methamphetamine labs must use is ephedrine or pseudoephedrine, an ingredient common to over-the-counter cold remedies. Several states have passed legislation requiring such products to be sold in certain formulations such as liquids or gels to discourage such illicit use, or have passed laws that restrict access by placing such products in pharmacies or behind counters and limiting the quantities that a person can purchase.

During the 79th Legislature, Texas lawmakers may address issues including increased penalties associated with the production, trafficking, and distribution of methamphetamines; the prevention and treatment of methamphetamine abuse; and the costs associated with these issues. Legislators may also address whether methamphetamine addiction treatment programs will be eligible for reimbursement under state assistance programs and at what rate; and whether state-funded clinics will provide such treatment. Legislators may also address issues relating to restricting the sale of and access to certain products, such as over-the-counter cold medications containing pseudoephedrine, which are used in the manufacturing of methamphetamines.

Medicare Prescription Drugs and the Impact on Medicaid

Prescription drugs are an essential component of health care for millions of Americans and while prescriptions are a relatively small share of overall health care spending—an estimated 11 percent—they are a key driver of health care costs, growing almost twice as fast as all other health services in recent years. Due to the rapid growth of drug costs and the fact that a significant portion of the population lacks insurance to cover such costs, prescription drugs and the pharmaceutical industry have come under increasing public scrutiny.

Older Americans, who represent only 15 percent of the United States population, account for nearly 40 percent of total spending on prescription drugs. Disabled persons and older Americans, who use a disproportionate share of prescription drugs, are less likely to have coverage than younger, healthier people. Since Medicare, prior to 2003, generally did not cover outpatient pharmaceutical costs, state Medicaid programs often filled the void.

During the past decade, as health care costs increased at a rapid pace and states began experiencing budgetary crises, escalating drug costs began placing additional stress on public and private insurance programs, and exacerbated the growth in state Medicaid spending. States began to introduce various methods of controlling prescription costs such as formularies, requiring generic rather than brand name drugs, tiered copayments, and prescription limits.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Public Law 108-173, was passed by the United States House of Representatives on November 22 and by the Senate on November 25 and was signed into law by President Bush on December 8, 2003. The MMA creates a new prescription drug benefit as Part D of Medicare. The new prescription drug benefit will begin in January 2006; until then, interim Medicare drug discount card and transitional assistance programs are in place.

Under the MMA, there are significant changes that will affect state Medicaid programs and budgets.

Beginning in June 2004 and ending in January 2006, Medicare beneficiaries will have access to Medicare-approved drug discount cards, estimated to produce an overall savings of five to 10 percent. No minimum discount is required under the MMA, and enrollees can sign up for only one drug discount card per year. For beneficiaries who do not have private insurance or Medicaid drug coverage and whose income is below 135 percent of the federal poverty level (FPL) (for 2004, that income level is \$12,569 per year per individual; \$16,862 per year per couple), the government will pay up to \$600 per year for drug-related expenses in 2004 and 2005 and will cover the cost of the annual enrollment fee. Unused balances will carry forward to the next year. Benefits must be coordinated with other state assistance programs.

Discount card programs must meet specific requirements and are authorized to charge an annual enrollment fee. Card programs cannot serve only a portion of a state, and beneficiaries must have a choice of at least two card programs but can enroll in only one program at a time. Changing of card programs is not permitted during a twelve-month enrollment cycle, except under certain special circumstances. Card sponsors must pass on to card enrollees negotiated prices on covered drugs and disclose to the United States Department of Health and Human Services (DHHS) the extent to which negotiated prices are passed through to enrollees.

Beginning in January 2006, Medicare will pay for outpatient prescription drugs through private plans. Beneficiaries are authorized to remain in the traditional fee-for-service program and enroll separately in private prescription drug plans (PDPs), or enroll in integrated Medicare Advantage (MA) plans for all Medicare-covered benefits, including prescription drugs.

Under the standard benefit, beneficiaries in 2006 will:

- Pay the first \$250 in drug costs (deductible);
- Pay 25 percent of total drug costs between \$250 and \$2,250;
- Pay 100 percent of total drug costs between \$2,250 and \$5,100 (the so-called \$2,850 "benefit gap"), equivalent to \$3,600 out-of-pocket; and
- Pay the greater of \$2 for generics, \$5 for brand drugs, or 5 percent coinsurance after reaching the \$3,600 out-of-pocket limit (\$5,100 catastrophic threshold).

Beneficiaries will pay an estimated \$25-\$40 per month premium for basic drug coverage in 2006 although it is anticipated that premiums will vary among plans, in addition to the Medicare Part B premium. Plans are authorized to offer supplemental benefits for an additional premium.

Plans are permitted to offer an actuarially equivalent alternative benefit design provided the alternative plan does not increase the Part D deductible or out-of-pocket limit. Plans

are required to cover drugs in each therapeutic class or category, but they are authorized to establish preferred drug lists, create preferred provider pharmacy networks, and offer reduced beneficiary cost-sharing for drugs dispensed by such pharmacies.

Additional assistance will be available to Medicare beneficiaries who qualify based on low incomes and limited assets. Low-income beneficiaries will have to meet both an income and an asset test to receive assistance for the first time in Medicare.

In 2006, beneficiaries who are eligible for full Medicaid benefits—an estimated 6.3 million dual eligibles (Medicare beneficiaries who also qualify for Medicaid because they are impoverished and/or have extensive health care needs), nationally—will begin to receive drug benefits under Medicare rather than Medicaid. The dual eligibles will pay no premiums or deductibles, and no drug costs above the out-of-pocket threshold.

Beneficiaries with incomes below certain thresholds may be eligible for a premium subsidy for basic coverage in their region but may be required to pay copayments and cost-sharing based on their income and assets.

In 2006, the new prescription drug benefit will also result in changes for those who currently supplement Medicare from other sources. Medicare Advantage plans, employers that elect to provide prescription drug benefits comparable to Part D, and Medigap plan insurers will also be affected.

Medicaid, which provides supplemental coverage for certain Medicare beneficiaries, will no longer offer drug coverage to dual eligibles; they will have to enroll in Part D plans for prescription drug benefits. The MMA requires states to pay Medicare a portion of the aggregate amount the states would have spent on prescription drugs for dual eligibles, resulting in an \$88.5 billion clawback between 2006 and 2013. States are required to use only state dollars, not federal Medicaid matching funds, to assist beneficiaries with cost-sharing or to cover drugs that are not on a Part D plan's formulary.

Currently, there are 2,392,000 Medicare beneficiaries in Texas, 592,000 of whom have no prescription drug coverage. CMS estimates that 497,000 beneficiaries in Texas are currently eligible to participate in the Transitional Assistance Program, and that some 323,000 in Texas will actually participate. Texas' projected Medicare-eligibles population in 2006 is 2,478,000, of whom 680,000 are projected to be potentially eligible for the Part D low income subsidy. Texas has an estimated 311,562 full dual eligible clients and 153,540 non-full dual eligible clients.

In Texas, full dual eligibles are entitled to Medicaid benefits that Medicare does not cover, including Medicaid drug coverage and benefits for low-income aged and disabled individuals in community waiver programs, nursing homes, and state schools. These

individuals are not eligible for participation in the Medicare drug discount card program, but will be eligible for Part D benefits in 2006.

Beneficiaries classified as other dual eligibles are eligible only for Medicaid payments for Medicare premiums, deductibles, and coinsurance for Medicare services, but are not entitled to actual Medicaid services. These individuals will be eligible for both the discount card program in 2004 and the Part D benefit in 2006.

Medicare assumes financial responsibility for drug coverage for the Medicaid full dual eligible population in January 2006, at which time Texas must discontinue Medicaid drug coverage for this population. After December 2005, there will be no federal Medicaid funding for Part D-covered drugs for full dual eligibles. This population will be automatically enrolled in a selected plan if they do not choose a Part D plan.

Texas, like other states, will be required to make monthly maintenance of effort (MOE) payments or clawback payments to Medicare based on an estimate of what the state would have paid for pharmacy benefits. The clawback factor will be 90 percent in 2006 and will be gradually phased down to 75 percent by 2015.

The state's role in the Medicare Part D program is largely administrative; however, there are significant policy implications. Texas will be responsible for converting dual eligible clients from Medicaid to Medicare drug coverage in 2006 and making the required monthly MOE payments. With respect to the Part D low income subsidy, again effective in 2006, Texas will be responsible for determining eligibility for the low income subsidy for Medicare drug benefit with a 50 percent federal match.

States are required to check low income subsidy applicants for Medicaid eligibility which may increase the Texas Medicaid-eligible aged and disabled caseloads vis-à-vis a recruitment effect like that experienced in the state's Children's Health Insurance Program. If an applicant is determined to be eligible, the state must enroll the individual in the state Medicaid program.

In addition to the potential caseload growth in Medicaid, Texas will face a number of budget issues related to the Medicare Part D benefit. Although the federal government will be responsible for the actual enrollment of beneficiaries, Texas likely will face automation costs related to eligibility determination given the complex eligibility criteria and process required under the MMA and staffing costs related to both eligibility determinations and appeals arising from such. The application process for the Medicare low income subsidy must work with Texas' Medicaid eligibility system (TIERS).

Texas could also incur higher costs related to institutional care if changes in pharmaceutical utilization result in health complications.

During the 79th Legislature, Texas lawmakers will likely address issues relating to modification of Texas' pharmaceutical assistance efforts in response to the MMA.

Federally Qualified Health Centers

A Federally Qualified Health Center (FQHC) is a federal designation from the Department of State Health Services (DSHS) and the Center for Medicare and Medicaid Services (CMS) that is assigned to private non-profit or public health care organizations that serve predominantly uninsured or medically underserved populations. FQHCs deliver preventive and primary care to patients regardless of their ability to pay and charges for health care services are set on a sliding scale according to income. FQHCs are located in or serve a federally designated medically underserved area or population (MUA or MUP).

FQHCs operate under a consumer board of directors governance structure, and provide comprehensive primary health, oral, and mental health/substance abuse services. FQHCs must comply with state and federal regulations.

FQHCs have been instrumental in promoting the eligibility determination and retention of eligible populations on Medicaid and the Children's Health Insurance Program as well as eliminating barriers to enrollment in these health insurance programs. FQHCs have also worked to expand existing health care services and increase access to health care for underserved areas of the state.

Some believe that health centers are cost effective because they improve access to primary care for the uninsured and reduce emergency room visits and hospital stays, particularly in rural and underserved areas. Expanding the capacity of FQHCs could help to reduce unmet needs, especially among the uninsured, by providing timely preventive care and lowering hospital and emergency room use.

State budget cuts in recent years have negatively impacted the FQHCs. According to a national survey of FQHCs, health centers facing the worst fiscal pressures are located in: California, Colorado, Massachusetts, Missouri, New York, Pennsylvania, and Texas.

The 78th Texas Legislature created the FQHC Incubator Program, which is administered by DSHS. The purpose of the Incubator Program is to strategically position clinics to qualify as a FQHC or as an FQHC look-alike. Incubator grants ended after August 31, 2004, for awards in the first year of the program and will end August 31, 2005, for awards in the second year of the program. DSHS will work with grantees to ensure that appropriate strategic steps are taken to secure long-term sustainability for the grantees.

During the 79th Legislature, lawmakers may face issues relating to FQHCs, including expanding the size of the health center program and stabilizing funding for existing health centers.

Costs of Diabetes in Texas

Diabetes is a chronic, incurable disease that is among the leading causes of amputations, blindness, and death among Texans. Diabetes is the body's inability to convert to energy the sugar found in the bloodstream. When blood sugar levels are consistently high, they can cause permanent or fatal damage to internal organs, and to the circulatory and nervous systems. That damage, if not aggressively treated and controlled, commonly leads to blindness, kidney failure, amputations, heart disease, strokes, and death.

Persons with diabetes experience elevated risks of a variety of other illnesses—including circulatory, visual, neurological, renal, and skin disorders—relative to their nondiabetic peers. Previous estimates of the economic burden of diabetes, however, have not taken this related morbidity and mortality into account and have therefore underestimated the cost to the nation due to this disease.

Diabetes disproportionately affects minority populations and is increasingly affecting children. Medical experts caution that the complications of diabetes may also begin to occur at earlier ages if children with Type II diabetes are not properly diagnosed and treated. The most likely explanation for the rapid increase in Type II diabetes among children in Texas is the increase in overweight children and corresponding decrease in physical activity. More than three-fourths of children diagnosed with Type II diabetes have a close relative with Type II diabetes, and tend to be obese or overweight; of African, Hispanic, Asian, or Native American descent; over 10 years of age; and in middle to late puberty. They typically have low levels of physical activity.

Although the legislature has in previous sessions enacted laws to address physical activity and meals served in the state's public schools, the 79th Legislature will likely address additional facets of diabetes identification, care, and treatment, especially in young Texans. Comprehensive community-based initiatives focusing on obesity and Type II diabetes in children and adolescents, programs to increase physical activity and improve nutrition among children, funding for such programs, health insurance coverage for programs dealing with obesity and overweight, and increasing public and health professional awareness of Type II diabetes are among the issues that may be addressed.

Corneal Tissue Transplantation Without Prior Consent

The issue of organ donation and the procedures whereby a person declares his or her wishes in this area have been the subject of some debate for several legislative sessions.

Under Chapter 692 (Texas Anatomical Gift Act), Health and Safety Code, a person can legally express his or her intent to make a donation through a will or through a donor card called a "Declaration of Anatomical Gift." The removal of donated organs usually takes place at the hospital shortly after a donor's death; under some circumstances, other tissues may be removed at the time of autopsy or in the coroner's office.

When a person dies in a hospital, a trained medical professional will approach the family to request the donation. If a person never signed a donor card, then someone in the family can give written legal permission for a donation. Texas law grants this decision to family members in order of priority: first, the surviving spouse; second, the decedent's adult children; third, either of the decedent's parents; fourth, an adult brother or sister; fifth, a court appointed guardian (if any); and sixth, anyone else legally authorized to dispose of the body.

If permission comes from a family member and there are other family members of the same or a higher priority, then an effort must be made to contact those people and make them aware of the proposed gift. The law prohibits the donation if the decedent ever expressed opposition to making an anatomical gift.

Corneal tissues are a special exception. The cornea plays a crucial role in vision, and there are no artificial equivalents to replace a damaged or diseased cornea. Under Texas law, corneal tissue can be removed without the knowledge of or consent from the next of kin.

Texas law allows the removal of corneal tissue without the family's consent if the donor died under circumstances requiring an inquest by the justice of the peace or medical examiner; no objection by a close family member is known to the justice of the peace or medical examiner; the removal of the corneal tissue will not interfere with a subsequent investigation or autopsy, and will not alter the decedent's facial appearance; and the justice of the peace or medical examiner authorizes the removal.

The cornea removal law applies only to deaths that are required to be investigated by a medical examiner or justice of the peace, such as homicides, suicides, accidents, those of unknown cause, and those that occur within 24 hours after admission to a hospital. Most deaths do not have to be investigated and in those cases, an eye bank must obtain consent from the donor or family.

A separate state law allows a medical examiner to permit removal of the heart, lung, and other organs and tissues if the family cannot be contacted within four hours after death, but that provision is less commonly used.

The corneal tissue exception has generated a number of legal actions, and medical examiners, justices of the peace, and eye banks around the state take varying approaches to the cornea removal law.

During the 78th Legislature, several bills were filed, but did not pass, that attempted to clarify the procedures regarding corneal tissue donation and transplant. For example, H.B. 290, by Representative Garnet Coleman, would have required that a justice of the peace or medical examiner permit the removal of corneal tissue only if prior consent was obtained from a decedent or a person authorized to give such consent. H.B. 2111, by Representative Mark Homer, would have established presumed consent to human organ donation, meaning that it would be assumed that an adult has agreed to be an organ donor unless that adult has officially recorded his or her desire not to donate.

Concerns have also been raised regarding the lack of public education efforts regarding the state's consent laws. Although hospitals in Texas are required by state law to develop a protocol for identifying potential organ and tissue donors and to make those protocols available to the public, they are not required to address the corneal exception.

Similar consent laws are in effect in nine other states. In six states, cornea removal is allowed without consent if a "reasonable" effort to contact relatives is made.

American Medical Association (AMA) policy supports the concept of "mandated choice," in which individuals are required to express their organ-donation preference while renewing a driver's license, file income tax forms, or perform some other task mandated by the state. By requiring that an active decision regarding donation be made, the reluctance of individuals to contemplate the disposition of their bodies after death might be overcome and individual autonomy would be protected. Mandated choice requires that the decision be made by the individual donor, not by a surrogate. Thus, the individual's preferences would be known and the need for decisions by the family that may not accurately reflect the individual's preferences would be reduced or eliminated.

The 79th Legislature will likely revisit the ethical and consent issues related to organ donation decisions, including presumed consent, mandated choice, and the appropriate role of the family in organ donation.

Impact of Drug and Alcohol Abuse by Pregnant Women on the Unborn

There is growing concern throughout our nation about the problems associated with alcohol and other drug use by pregnant women. According to a National Survey on Drug Use and Health, 5.5 percent of women surveyed reported using illicit drugs while they were pregnant, 18.8 percent reported using alcohol, and 20.4 percent reported using tobacco. The cost of alcohol, tobacco, and drug use during pregnancy is high in both human and economic terms. Identifying alcohol abuse among pregnant women may be

difficult for a variety of reasons including: lack of routine prenatal screening for alcohol abuse; reluctance to self-report alcohol abuse to prenatal care providers; mixed messages from some prenatal care providers who advise patients that moderate alcohol use is safe; and underestimating the amount of alcohol being consumed.

Substance use during pregnancy is of special concern since it places both the woman and the fetus at risk of complications of pregnancy and delivery, such as premature labor, premature delivery, toxemia of pregnancy, and stillbirth delivery. In addition, various types of adverse outcomes for infants have been associated with substance abuse during pregnancy, including fetal alcohol syndrome, intrauterine growth retardation, premature birth, major congenital anomalies, and sudden infant death syndrome.

Continued substance use or abuse by a woman after a delivery may adversely impact the health and development of the baby since high levels of substance use may impair the woman's ability to parent effectively.

Lawmakers must balance a woman's right to bodily integrity with society's interest in ensuring healthy pregnancies and assess whether punitive approaches will foster or hinder healthy outcomes for both the woman and her child. Some states have attempted to criminalize prenatal drug use or treat it as grounds for terminating parental rights, while others have placed a priority on making drug treatment more readily available to pregnant women. Other states have expanded their child welfare laws to address prenatal drug exposure treating it as a matter of civil rather than criminal law. In those states, a child born exposed to drugs is presumed to be abused or neglected, or the laws provide that positive results from newborn toxicology screenings constitute evidence of child abuse or neglect and provide grounds for removal of the infant from the mother's custody and possible termination of parental rights.

Additionally, some states require health care professionals to report or test for prenatal drug exposure—information that the state may use as evidence in child welfare proceedings. Three states have enacted laws authorizing the civil commitment of women who use drugs during pregnancy. Some states have elected to use nonpunitive approaches by creating and funding treatment programs for this population or by giving pregnant women priority access to treatment.

Attorney General Greg Abbott has been asked whether S.B. 319, 78th Legislature, Regular Session, is appropriately being invoked to require physicians to report pregnant patients who are using or have used controlled substances during their pregnancy to local law enforcement agencies or to the Department of Protective and Regulatory Services. The issue of whether S.B. 319 amended provisions governing physician/patient confidentiality or child abuse reporting has also been raised.

The 79th Legislature will likely address issues relating to substance use and abuse during pregnancy, including the criminalization of such behavior, treatment for substance abusing pregnant women and their children, and privacy and confidentiality issues.

Electronic Transactions in Health Care

The need to expedite pre-authorizations for medical procedures and services, and to increase the efficiency of claims processing so that medical providers are paid once procedures are pre-authorized and performed, continue to be important issues in health and human services. Administrative costs associated with processing health care claims also remain an issue.

Some have advocated federal legislation to promote universal adoption of electronic medical records and the development of standards for such software and incentives for its use to reduce medical errors, provide doctors with up-to-date patient histories, and provide immediate access to information on best practices and new clinical guidelines. Electronic records could also facilitate quality measurement and improvement, reduce paperwork, and streamline health transactions where a patient's medical records could be shared electronically among doctors and other health care professionals.

Currently, about 13 percent of hospitals and 14 to 28 percent of physician practices are using some form of electronic medical records. A survey by the Commonwealth Fund reports that adoption of and receptivity to health information technology among solo practices and small groups lags significantly behind large group practices. Physician groups have also expressed concern about the costs associated with electronic medical records.

The federal government, in partnership with the Foundation for eHealth Initiative, has provided funds for nine community demonstrations and has issued grants for five state-level demonstrations of electronic health records programs. The Harvard Center for Information Technology Leadership estimates that the total public and private cost of building a standards-based national health information infrastructure will be \$276 billion over 10 years. Advanced ambulatory electronic health records cost about \$29,000 per physician.

As mandated by the Health Insurance Portability and Accountability Act (HIPAA), physicians filing electronic claims with Medicare were scheduled to be using a standard format as of October 16, 2003. At that time, the Centers for Medicare and Medicaid Services (CMS) implemented a contingency plan allowing physicians to continue submitting noncompliant claims, known as legacy claims, as long as they were moving toward meeting HIPAA standards. CMS has since changed that policy, and legacy claims submitted after July 6, 2004, will be treated as paper submissions.

Compliance with the HIPAA electronic format is moving forward, but the process has been delayed by the lack of clarity as to what constitutes a compliant claim, and the format and data content of HIPAA-compliant claims. CMS has not codified in rule what data elements are required in a HIPAA-compliant claim. The absence of electronic acknowledgement information also remains an issue of concern.

Another issue is that many physician practices, especially small ones, rely on an outside company for their billing, and those vendors have also encountered problems. If a vendor is not HIPAA-compliant and does not have a compliance timetable, physicians may be forced to change vendors to receive timely payments. Due to the considerable capital investment and the time and expense of retraining staff, many physicians may find this option disadvantageous.

Other electronic transactions, such as premium payments, eligibility status, and referrals, may also generate additional issues for physicians and policymakers trying to ensure HIPAA compliance.

The role of employers with respect to employee health information, relationships between an employer and its insurance company or third party administrator, and employer-sponsored ERISA plans in relation to HIPAA may also arise.

The 79th Legislature may address issues relating to HIPAA compliance and related medical record privacy issues.

Uncompensated Care

Texas has the highest rate of uninsured persons in any state in the United States; 24.7 percent of Texas residents are uninsured. The combination of exigent need for health care access for indigent populations and finite resources is straining budgets at all levels of government.

Although Article 9, Section 14, of the Texas Constitution authorizes counties to care for their indigent residents, it does not require the counties to do so. In 1985, however, through the Indigent Health Care and Treatment Act (Chapter 61, Health and Safety Code), the legislature mandated that Texas counties offer basic health care services to indigent residents.

People who have no health insurance and who are ineligible for state or federal programs usually obtain health care through charity care clinics, local indigent-care programs, and hospital emergency departments. Although hospitals are not required to offer unreimbursed preventive care services, the federal Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA) requires hospitals to assess and stabilize any

patient, regardless of the patient's ability to pay, before moving that patient to another facility for treatment.

Counties are also authorized by the Texas Constitution to create a hospital district which is a special taxing district comprising one or more counties that can raise revenue through a property tax of up to 75 cents per \$100 valuation of all taxable property in the district.

Counties are statutorily authorized to operate a public hospital or a county indigent health care program (CIHCP) under the Indigent Health Care and Treatment Act of 1985. County indigent-care programs offer basic health care services in a clinic or office setting, for people who are ineligible for other government health care programs.

In 2003, 87 counties had only one hospital district; 29 counties had some combination of a public hospital and a county indigent health care program or a hospital district; and 110 counties had only a CIHCP.

Under Section 61.028 (Basic Health Care Services), Health and Safety Code, a county is required to provide the following basic health care services: primary and preventative services including immunizations, medical screenings, and annual physical examinations; inpatient and outpatient hospital services; rural health clinics; laboratory and X-ray services; family planning services; physician services; three prescriptions a month; and skilled nursing facility services, regardless of the patient's age. Counties are authorized but not required to provide additional health care services.

Under Section 61.035 (Limitation of County Liability), Health and Safety Code, the maximum county liability for each fiscal year for health care services provided to each eligible county resident is up to \$30,000 or the payment of 30 days of hospitalization or treatment in a skilled nursing facility, or both. The county indigent health care fund, administered by the Department of State Health Services, may be used to reimburse counties for a portion of their indigent-care costs after the county qualifies for such by spending at least eight percent of the county's general tax levy for that year on basic health services.

Hospitals often treat patients who reside outside their service areas for which they subsequently receive partial or no reimbursement. Out-of-area care also occurs at regional medical centers that offer an array of specialized services, such as trauma care.

The 76th Legislature established the Tertiary Medical Care program, using unclaimed lottery funds to reimburse hospitals for tertiary care, stabilization services, and extraordinary emergency services to out-of-area patients. State-designated trauma centers and teaching hospitals are eligible to participate in the program. The 78th Legislature did not appropriate any funds for tertiary care and H.B. 2292, 78th Legislature, Regular Session, eliminated the requirement that a portion of unclaimed

lottery funds be used to reimburse counties for uncompensated care. The 78th Legislature established the Trauma Facility and Medical Services Account (TFMSA) to reimburse state-designated trauma facilities for uncompensated trauma care using a portion of state traffic fines collected and a surcharge on habitual driving offenders.

The 78th Legislature also reallocated a portion of unclaimed lottery funds to teaching hospitals through a rider in the General Appropriations Act. Rider 53, Article II, General Appropriations Act, limits distribution of indigent-care funds to a single county to no more than 35 percent of the total funds appropriated.

Texas established a permanent fund as part of the tobacco settlement agreement to offset unreimbursed health care provided by local governments. Disbursement from the fund is based on the amount local governments spend on county indigent-care services, unreimbursed correctional facility care, health care services beyond the required basic services, and other facility-related costs. Counties also may recoup indigent care costs from Medicaid and supplemental security insurance (SSI); however, counties' and hospital districts' indigent care obligations may increase due to changes in the Medicaid program, including the abolition of the medically needy spend-down option for Medicaid which allowed the cost of medical bills to be factored into an applicant's overall income.

The 79th Legislature may consider various ways to address funding for indigent health care including proposals to expand Medicaid to include county indigent care recipients; establish a system of regional medical centers with outlying health care facilities; enhance enforcement mechanisms relating to CIHCPs; and raising or removing the cap per eligible resident to help ensure that counties pay for a greater portion of their residents' care.

Call Center Model for Eligibility Determination

Texas currently spends nearly \$700 million a year on eligibility determination systems for Medicaid, food stamps, Temporary Assistance for Needy Families (TANF), and long-term care services.

The Texas Health and Human Services Commission (HHSC) initiated a major redesign of the state's eligibility determination system allowing clients to apply in person, through the Internet, over the phone, and by fax or mail. HHSC plans to establish call centers to receive and process applications, and provide an automated phone system to enable clients to track the progress of their applications. TIERS, the computerized eligibility determination tool being piloted in Travis County for TANF, food stamps, and Medicaid, would be the core of the new system. HHSC also plans to add other services, such as the Children's Health Insurance Program (CHIP), to the call center system.

Proponents of the new system cite as advantages improved access to state services for working Texans, and for people who lack transportation, live in remote areas, or who have difficulty traveling. Proponents also claim that the call center model has been effective and cost efficient in other states.

Opponents of the call center model suggest that abolishing most of the 381 local state-operated eligibility offices, as well as the satellite offices at hospitals and community health centers, and reorganizing the remaining offices as benefit issuance centers (BIC), will result in a reduction of an estimated 7,864 state employees and will not achieve a more efficient eligibility determination system. Opponents also express concern about a potential loss of state control over quality and size of the private workforce hired to staff the call centers, and that this approach to delivering human services could lead to reduced access for certain clients or some of the most vulnerable recipients falling through the cracks.

HHSC estimates that these changes will generate a savings of \$389 million in state and federal funds over five years, 46 percent of which is state dollars. For fiscal years 2004-2005, \$31.5 million of these savings could accrue if the assumptions used by HHSC in making the calculations are accurate. HHSC began implementing the new system in September 2004—the beginning of the 2005 fiscal year—and will complete the transition by 2006.

The 79th Legislature may consider issues relating to the privatization of the health and human services eligibility determination system.

Study of Feasibility of Facility Closure and Consolidation of State Schools and State Hospitals

Pursuant to Rider 55 (Article II, Health and Human Services Commission) of the General Appropriations Act, H.B. 1, 78th Legislature, Regular Session, the Health and Human Services Commission (HHSC) was directed to study the feasibility of closing and consolidating state schools and state hospitals. HHSC contracted with a private firm, Public Consulting Group (PCG), to perform that study.

PCG was directed to:

- study the feasibility of such closures and consolidations, in accordance with the criteria set forth in Rider 55;
- conduct site visits to state schools and hospitals;
- meet with affected community leaders to discuss implications and opportunities relating to closures and consolidations; and

- prepare a report with recommendations and explanations concerning specific facilities, and identifying costs, savings, and (if any) reductions in the waiver waiting list.

PCG's final report was scheduled to be submitted on December 31, 2004.

The 79th Legislature may consider legislation that would mandate the closure or consolidation of one or more state schools or state hospitals.

Children's Health Insurance Program (CHIP)

Section 2.46 of H.B. 2292, 78th Legislature, Regular Session, authorized the Texas Health and Human Services Commission (HHSC) to establish new eligibility standards for the Children's Health Insurance Program (CHIP), including the allowable assets for a family whose gross family income is above 150 percent of the Federal Poverty Level (FPL).

The proposed assets test rules were published in the Texas Register on February 20, 2004, and HHSC held public hearings on the rules in Austin on March 15 and 16, 2004. The proposed rules subsequently were modified to exempt certain assets from the calculation, including retirement accounts that have penalties for early withdrawal; insurance with a cash value; Internal Revenue Code 529 qualified college savings program accounts; educational grants and scholarships; and vehicles modified to transport a household member with a disability.

Families with incomes above 150 percent of the FPL (e.g., for a family of four, an annual income of \$28,275 in 2004) who apply for or renew CHIP coverage and who have not been found eligible for a new term of coverage before August 24, 2004, must have assets below a specified threshold. Liquid assets (cash, bank accounts, and stocks and bonds) and vehicles (an automobile, truck, motorcycle, SUV, van, boat, or motor home) will be included in the asset calculation; real property will not. If a family does not own a vehicle that is exempt, the family may exempt the first \$15,000 of the highest valued vehicle and \$4,650 of the value of each additional vehicle.

Governor Perry issued a directive on August 11, 2004, requesting that HHSC delay implementation of the disenrollment deadline for families who have missed multiple monthly premium payments. HHSC was also asked to explore alternative approaches to cost sharing to ensure that qualified families maintain access to CHIP. HHSC temporarily suspended the requirement to pay monthly premium payments for all CHIP-enrolled families on November 1, 2004.

The 2004 caseload for the CHIP program has decreased as assumed in H.B. 1, 78th Legislature, Regular Session, but it is not expected to reach the projected level. The 79th Legislature will be faced with issues related to funding for higher than anticipated caseload projections or issues relating to eligibility standards for participation in the CHIP program including rules governing allowable assets, family income, and copayments and premiums.

CHIP Exclusive Provider Organization Contracts

On July 8, 2004, the State Auditor's Office (SAO) released a report, *An Audit Report on the Health and Human Services Commission's Administration of the CHIP Exclusive Provider Organization Contract*. The SAO noted that the Health and Human Services Commission (HHSC) had issued approximately \$20 million in unnecessary or excessive payments to Clarendon National Insurance Company (Clarendon), the exclusive provider organization (EPO) for the Children's Health Insurance Program (CHIP). The SAO report suggested that these payments, combined with deficiencies in contracting practices and contract monitoring, were an "abuse of the [HHSC's] fiduciary responsibility to appropriately oversee and manage the EPO contract and associated CHIP funds."

Because HHSC paid Clarendon insurance-related fees that were unnecessary and paid excessive amounts, SAO noted that HHSC's decision to self-insure the cost of medical claims fundamentally altered the nature of the EPO's financial obligation. A new EPO contract was not procured; the existing contract was merely amended. This resulted in a noncompetitive procurement that operated to the state's disadvantage.

SAO also found that excessive or undocumented payments were made to Clarendon's subcontractors, that HHSC's practice of retroactively amending contracts created uncertainty regarding the state's financial obligation, and that inadequate contract terms did not prevent Clarendon from inappropriately converting CHIP funds for corporate use.

Inadequately defined financial reporting requirements contributed to misreporting and overpayment of claims. HHSC was also criticized for failing to audit and exercise proper oversight of Clarendon.

The 79th Legislature will likely consider issues related to state agency contract management practices, particularly those that will improve accountability and strengthen contracting practices.

Hospital Infection Rates

Each year, more than two million people develop a hospital-acquired infection, 100,000 of whom die as a result. The Centers for Disease Control reports that one of every 20 patients gets an infection while hospitalized and that a single hospital infection may

increase the cost of medical care by an estimated \$38,600 to \$58,000. Health professionals, patients, and consumer advocates are attempting to find ways to prevent these infections from developing. Hospitals have promoted basic steps such as establishing strict hand-washing protocols or simple checklists of necessary steps to ensure patient safety.

The checklists are specific to areas of care and address basic safety protocols like washing hands and when to wear a cap, gown, and mask. Other lists are more specific, with recommendations to use a particular type of soap. Researchers have found that using such checklists reduces the average length of a patient's stay from 2.2 days to 1.1 days, thereby reducing the patient's risk of exposure to infections and other dangers. Over 200 hospitals across the country have adopted the use of the checklist system.

Congress recently passed the Patient Safety and Quality Improvement Act of 2004, a bill prescribing a confidential, voluntary reporting system in which physicians, hospitals, and other health care providers could report information on errors to patient safety organizations which would then collect and analyze the data to devise patient safety improvement strategies. Concerns have been raised about the confidentiality aspects of the Act and, because it is voluntary, its efficacy in preventing medical errors. Issues have also been raised about the impact on state reporting laws.

Missouri lawmakers, in 2004, enacted the Missouri Nosocomial Infection Control Act (S.B. 1279) to improve the quality of care in the state's hospitals. Florida, Illinois, and Pennsylvania also have laws to collect and publicly report hospital-specific infection rates.

The 2004 California Legislature passed S.B. 1487, a bill that required hospitals to report to the Office of Statewide Health Planning and Development the rate at which their patients develop infections during treatment and mandated that the office make the information publicly available; however, the measure was subsequently vetoed.

States with public reporting or public access to hospital-specific outcome or incident information include California, Colorado, Connecticut, Maine, New Jersey, New York, Ohio, Pennsylvania, and Texas. The specific information collected, reported, and/or made available to the public varies by state.

Chapter 108, Texas Health and Safety Code, enacted in 1995, requires the Texas Healthcare Information Council to report risk-adjusted mortality rates on a variety of procedures. Texas law does provide that reporting is voluntary for rural providers and hospitals, if the hospital: is exempt from state franchise, sales, ad valorem, or other state or local taxes and does not seek or receive reimbursement from any source for providing health care services to patients. Also exempted are individual physicians or an entity that is composed entirely of physicians and that is a professional association organized under

the Texas Professional Association Act (Article 1528f, Vernon's Texas Civil Statutes), a limited liability partnership organized under the Texas Revised Partnership Act (Article 6132b-3.08, Vernon's Texas Civil Statutes), or a limited liability company organized under the Texas Limited Liability Company Act (Article 1528n, Vernon's Texas Civil Statutes), except to the extent the entity owns and operates a health care facility in this state.

The 79th Legislature will likely consider issues related to the state's medical error and hospital infection rate reporting requirements given the need to improve accountability and strengthen reporting practices, as well as to resolve any conflicts between the state statute and federal law.

Health Savings Accounts

The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MPDIM) includes provisions that authorize the creation of health savings accounts (HSAs), which follow the medical savings account (MSA) model but are less restrictive.

Proponents of HSAs believe that medical costs can be controlled more effectively if consumers have to directly spend their own funds for care. With their personal funds at stake, they argue, consumers will make more cost-effective choices on health care. They also suggest that HSAs will create a tax incentive to save for future health care expenses and decrease dependency on traditional health insurance.

Opponents of HSAs suggest that HSAs will attract young, healthy people who are less dependent on health insurance, thereby increasing the cost of coverage for those who remain in traditional health plans by undermining the shared-risk concept that makes insurance work. Some critics suggest that HSAs may provide a mechanism through which employers can discontinue employee health care coverage. Opponents also believe that HSAs are not available to individuals covered by most health insurance plans and are not cost effective for individuals with high ongoing medical costs.

Concerns that have been raised by both supporters and critics include the limited availability of HSA-qualified insurance; the lack of affordable health insurance alternatives for an applicant who cannot afford the underlying qualifying insurance; lack of clarity in the law itself regarding the administrative functions of the United States Department of the Treasury and the Internal Revenue Service (IRS); and the need for clarification regarding procedural issues by the IRS.

Almost any person, younger than 65 years of age, who has an HSA-qualified health plan (a high-deductible policy which some refer to as catastrophic coverage) is eligible to open an HSA effective January 1, 2004. People who converted an MSA plan that was in force before December 31, 2003, are also eligible.

Since not all health insurance plans are approved for this purpose, not everyone is eligible for an HSA. Persons not eligible for an HSA include a person who is covered by any non-qualified individual or group health insurance plan; is eligible for Medicare; or is a dependant on another person's tax return. Dependants are not eligible for a separate HSA account or tax deduction, but may be included in a family plan.

HSA policies must have specified minimum annual deductibles and caps on out-of-pocket expenses. Neither the policy holder nor the policy holder's spouse may be covered by any other health plan although there is an exception for certain "permitted" insurance coverage such as a specialty policy for a specific disease or illness.

HSA contributions must be placed in a trust account that is managed by a bank, insurance company, or an approved third-party administrator; does not invest in life insurance contracts; does not commingle funds; and in which the individual's interest is not forfeitable.

HSA account holders may claim a tax deduction for every dollar put into the HSA account, even if account holders do not itemize deductions on their tax return; however, HSA deductions are limited if a person is not enrolled in a qualifying health plan for the full 12 months of the tax year and HSA funds are tax-free only if used for qualified medical expenses as defined in Section 213 of the Internal Revenue Code. Only expenses incurred while the HSA-qualified health insurance plan was in force may be included as a tax-free withdrawal.

If account holders spend the money on non-qualified expenses, they will owe income tax plus a penalty. The penalty is waived for people age 65 years and older, and in cases of disability or death. Upon death, HSA ownership may transfer to the spouse on a tax-free basis.

Employer contributions to an HSA account are not subject to wage taxes like FICA, but employees' contributions are subject to FICA taxes. Self-employed people pay a self-employment tax instead which is not reduced by HSA contributions. HSAs are portable and transfer with the individual who changes employment.

A qualifying HSA health plan is an individual or group insurance plan that meets the requirements for deductible, co-insurance, supplemental coverage, and reporting requirements established by the IRS, or an uninsured health plan that meets these same requirements. Health insurance companies also must meet both federal and state-specific requirements; however, some areas of conflict exist between the federal and state requirements include "per person deductibles" and "mandated coverage" that may be required under state insurance laws but are disallowed under the federal HSA laws.

The Internal Revenue Service (IRS) provided initial guidance on HSAs in January 2004. On March 30, 2004 the United States Department of the Treasury clarified that HSA plans may provide preventative care benefits and state-mandated coverage without violating federal requirements. Additional guidance from the United States Department of Labor will also be necessary to clarify issues related to HSAs, the Employee Retirement Income Security Act (ERISA) coverage, and the interaction of HSAs and privacy rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

IRS Notice 2004-23 clarifies that state law requirements for preventive care coverage will be judged on the same standards as other preventive care services. In other words, the IRS guidance, rather than the state laws, must be applied to state mandates to determine what will constitute preventive care services that can be provided before the deductible is satisfied in a high-deductible health plan (HDHP).

The IRS and the Treasury issued Revenue Ruling 2004-45 which restricts an employee from making HSA contributions if they are covered by an employer-sponsored medical plan such as a Flexible Spending Account (FSA) or Health Reimbursement Arrangement (HRA). Since the trend in employer-provided health plans has been moving toward consumer-driven designs such as FSA and HRA plans, this ruling may reduce participation in HSA plans.

In most cases, state insurance department approval is required for a health insurance company to convert an HDHP to an HSA-qualified high-deductible plan. The IRS also issued a correction to the HSA law that affects participants over age 65. IRS Notice 2004-67, issued September 7, 2004, clarifies that Medicare enrollment rather than eligibility is the key factor in determining eligibility for an HSA. This is important for people over the age of 65 who are covered by employer-provided health plans as their primary coverage.

Legislatures in several states have passed legislation that will make it easier to provide HSAs under their states' insurance laws.

The Bush Administration's 2005 budget includes a proposal to expand HSA coverage by allowing individuals to take a separate, additional deduction for the premium costs of a HDHP, as long as the policy is purchased in the individual health insurance market. The deduction would not be available to HSA participants who obtain high-deductible coverage through their employer.

The 79th Legislature may consider issues relating to the availability of and access to HSA plans in Texas, as well as the potential adverse impact on employer-sponsored health care coverage.

Therapeutic Cloning

Cloning is the production of one or more individual plants or animals, in whole or in part, that are genetically identical to the original plant or animal. Therapeutic cloning or somatic cell nuclear transfer cloning involves a procedure whereby an embryo is created and allowed to grow for a period of time (10 to 14 days) after which the embryo's stem cells would be extracted and encouraged to grow into a human tissue or a complete human organ for transplant. The end result could be a replacement organ, a piece of nerve tissue, or quantity of skin. The first successful therapeutic cloning was accomplished in 2001 by Advanced Cell Technology, a biotech company in Worcester, Massachusetts.

DNA testing on a human involves gathering cells that contain all of the information required to produce a duplicate or cloned person. In somatic cell nuclear transfer, the DNA of the donor cell is removed, thus converting it to a pre-embryo. Applying an electrical shock to the pre-embryo begins the production of stem cells which are subsequently removed from the pre-embryo and are encouraged to grow into whatever tissue or organ is needed to treat a patient. Stem cells are a unique form of human cell that theoretically can develop into many organs or body parts.

If somatic cell nuclear transfer cloning is successful, then perfectly matched replacement organs could become available to people with certain illnesses such as diabetes, Parkinson's disease, or spinal cord injuries.

Somatic cell nuclear transfer cloning would have a number of advantages, when compared to regular organ transplant donated by a second person, including a reduced risk of rejection of a transplanted organ due to DNA matching; another individual would not have to experience pain, inconvenience, and potentially shortened life span in order to donate the organ; a donor recipient would not have to wait until an unrelated donor dies to obtain a transplant; and a new organ with unimpaired functionality could be grown specifically for a donor recipient.

The potential problems associated with somatic cell nuclear transfer cloning include, among other things, that methods have yet to be fully developed that will cure or treat diseases with embryonic stem cells as opposed to adult stem cells which have more restricted uses and issues related to the stability of stem cells which have sometimes mutated, and thus been rejected by a donor recipient or produced tumors. Issues related to the production of stem cells and current inefficiencies in the process also place limitations on the use of stem cells for both ethical and economic reasons. Finally, conflicts regarding the life-status of embryos must be addressed. Because human embryos must be destroyed to retrieve embryonic stem cells, many believe that the process is unethical and immoral.

In August 2001, President Bush authorized federal funding for stem cell research using existing stem cell lines (there are currently an estimated 20 lines in research facilities across the nation); however, he prohibited federal funding for research using stem cells derived from frozen embryos, about 100,000 of which existed at fertility labs across the country.

State initiatives have gained prominence because of the federal restrictions on embryonic stem cell research. In 2004, California voters passed a ballot initiative that would provide \$3 billion in state funds for stem cell research over the next ten years through tax-free state bonds. Missouri legislators are considering a ban on embryonic stem-cell research. New Jersey is planning to spend \$6.5 million on a new stem-cell research facility.

The 79th Legislature may consider issues relating to somatic cell nuclear transfer cloning.

Caseload Growth in Foster Care

Rider 21 (Article III, Foster Care Payments), General Appropriations Act, 78th Legislature, Regular Session, appropriated funds for foster care payments based on anticipated savings due to the redesign of the Foster Care Levels of Care (LOC) system. The Texas Department of Family and Protective Services (DFPS) (formerly the Texas Department of Protective and Regulatory Services) was directed to work with the Health and Human Services Commission (HHSC) to create a LOC rate system that merged existing levels of care to generate cost savings and efficiencies in the classification of foster care children.

The foster family rate is the minimum amount that the Child Placing Agency (CPA) must pass through to the foster parent caring for the child. In August 2003, DPRS adopted daily blended rates under four categories, replacing the former system that included six categories.

Through Rider 26 (Article III, Adoption Subsidy Payments), General Appropriations Act, 78th Legislature, Regular Session, the legislature also directed DFPS to establish a tiered payment schedule based on a child's LOC needs at the time of adoption placement. The tiered payment schedule applies only to children placed after September 1, 2003.

In August 2003, the new rates for children placed after September 1, 2003, were established at a maximum of \$400 per month for children who are in a Basic Services LOC, and a maximum of \$545 per month for all children in a higher level of care at placement. Prior to September 1, 2003, the adoption subsidy for all children was set at \$521 per month for children under age 12.

H.B. 2292, 78th Legislature, Regular Session, consolidated caseload forecasting for both foster care and adoption subsidies at HHSC. According to HHSC forecasts, the average

number of children per month in paid foster care will increase an estimated 6.2 percent for FY 2006 and 6.7 percent for FY 2007.

HHSC estimates that the caseload growth for the average number of children provided adoption subsidies per month is projected to be 8.4 percent higher for FY 2006 and 7.4 percent for FY 2007.

DFPS reduced the average daily rate for foster care by four percent each year, and the average monthly adoption subsidy payment by three percent each year during the current biennium to stay within the agency's appropriated budget. Although the agency has requested funds to restore these rates, DFPS did not request additional funding for higher service levels in foster care or higher adoption subsidy payments for the FY 2006-2007 biennium.

Texas has more than 100,000 children living in households headed by kinship caregivers who are eligible for a range of state and federal programs. Eligible caregivers and children may receive cash assistance, and grandparents who are primary caregivers may qualify for a one-time supplemental payment of \$1,000 through the Texas Works program. Kinship care families may also be eligible for food stamps and health insurance for the children in their care through Medicaid or the Children's Health Insurance Program (CHIP).

Kinship caregivers have to meet the same licensing standards and receive the same foster care payment rate as non-kin foster parents. Texas currently does not have a subsidized guardianship program.

Due to anticipated increases in caseloads for foster care and adoption placements, the 79th Legislature may consider issues relating to the funding for and structure of the state's foster care and adoption programs.

By state law, special needs children in foster care must be watched by a certified respite care worker who is trained in CPR and is experienced in dealing with special needs children. The need for additional respite care workers and funding for respite care, especially for special needs foster children, is an issue that the 79th Legislature may consider.

The 79th Legislature may also consider issues relating to the whether the state should focus on the health, safety, and education of the children in its custody rather than actual child-placement activities. Comptroller of Public Accounts (comptroller) Carole Keeton Strayhorn, in her report, "Forgotten Children: A Special Report on the Texas Foster Care System," identified problems in the system and has suggested that private child-placing agencies have access to community resources that the state government does not and that such entities are more appropriate for making child placements.

The comptroller and others have also been critical of the lack of accountability in the foster care and adoption system. State officials have been urged to seek accreditation of both DFPS and foster care providers to ensure that consistent standards of care and fiscal responsibility are being met and to establish a system through which all providers are held to the same standards and those who excel can be recognized and rewarded.

Childhood Obesity

Obesity is no longer simply a matter of personal appearance or health—it has become an increasingly costly and deadly public health concern that significantly affects economic productivity and fiscal resources. During the past 20 years there has been a dramatic increase in obesity in the United States, and the disease has reached epidemic proportions, according to the federal Centers for Disease Control and Prevention (CDC). Between 1991 and 2001, obesity rates for American adults increased by 74 percent. Obesity rates have doubled for children and tripled for adolescents in the last twenty years.

Obesity is endangering the lives of more Americans than ever before. Today, 64.5 percent of adult Americans (about 127 million) are categorized as being overweight or obese; approximately 30.3 percent of children ages six to 11 are overweight and 15.3 percent are obese; and for adolescents between the ages of 12 and 19, some 30.4 percent are overweight and 15.5 percent are obese.

In 1988, Texas reported an obesity rate of less than 10 percent; by 2002, 63 percent of Texas adults were overweight or obese and 35 percent of Texas school students were overweight or at risk of becoming overweight.

According to a study cited in the June 2004 issue of the *American Journal of Public Health*, Texas children now have the unfortunate distinction of being the fattest in the nation. Nearly one-third of school-aged Texans are classified as overweight or obese and child obesity rates in this state are increasing faster than the national rate. Prevalence of overweight was highest among Hispanic boys, and younger Hispanic and African American girls.

This burgeoning epidemic is leading to additional absences from work and school, lost productivity, and higher health care costs. Obese children increasingly suffer from depression, anxiety, diabetes, and other health problems and are more likely to grow up to be obese adults. The number of children with Type II diabetes has increased ten-fold in the last five years alone, leading some to refer to the problem as "obesity's twin epidemic."

Reversing the upward trend of the obesity epidemic will require significant collaboration between government, the private sector, and the public. Overweight during childhood

and adolescence is related to increased disease and mortality in later life, including increased risk of moderate to severe asthma, high fasting blood insulin levels (a risk factor for Type II diabetes); persistently elevated blood pressure levels; a variety of orthopedic complications; sleep apnea; and deficits in logical thinking.

Obesity is now the second leading factor associated with unnecessary deaths in the United States, causing at least 300,000 deaths each year. Only tobacco use causes more preventable deaths in the United States. The total direct and indirect costs, including medical costs and lost productivity, were estimated at \$117 billion nationally for 2000, according to the 2001 Surgeon General's *Call to Action to Prevent and Decrease Overweight and Obesity*. This figure represents nine percent of the nation's total health care costs.

States are paying a significant amount for obesity care. Currently, 4,000,000 obese children are Medicaid beneficiaries, and an unknown number of adult Medicaid beneficiaries are obese. According to CDC's National Health and Nutrition Examination Survey (2000), among Medicare recipients, obesity prevalence ranges from 12 percent to 30 percent; among Medicaid recipients, obesity prevalence ranges from 21 percent to 44 percent.

Strategies to prevent obesity among children include:

- changing school curricula to include nutrition education (94 percent);
- increasing promotion of healthy foods in school vending machines (82 percent);
- restricting availability of less healthy foods in school cafeterias (75 percent); and
- reducing marketing of unhealthy foods to children during children's television programs.

Texas, in 2001, enacted S.B. 19, by Senator Nelson, to encourage and assist in establishing in all public schools programs of nutrition education and minimal standards of physical education. The Texas Department of Health (TDH) developed the AIM for a Healthy Weight Prevention of Obesity in Texas program that attempts to reduce the burden of weight-related disease by decreasing the prevalence of obesity.

In 2001, TDH formed a 20-member Texas Statewide Obesity Task Force to develop a strategic plan for reversing the obesity epidemic in Texas. The Strategic Plan for the Prevention of Obesity in Texas was released in February 2003, and addresses the prevention and control of obesity in Texas families through nutrition and physical activity interventions and identifies appropriate interventions for schoolchildren and their families.

S.B. 474, by Senator Lucio, enacted by the 78th Legislature, Regular Session, established the Joint Committee on Nutrition and Health in Public Schools. The committee is charged with determining the nutritional content and quality of foods and beverages served to public school children, including food service meals, a la carte foods, and competitive foods and food provided in vending machines; evaluating the short-term and long-term financial, psychological, and physiological impact of obesity in public school children; assessing the academic, emotional, and health value of a universal breakfast and lunch program by evaluating school children from school districts that provide each child a free or reduced-price breakfast and lunch; and evaluating school contracts relating to competitive food products and vending machines.

The 79th Legislature may consider legislation designed to reinforce the steps previously taken to increase physical activity, promote better diet, and improve prevention and treatment in the battle against childhood obesity.

Health Licensing Boards

State agencies in Texas, including regulatory boards, are subject to oversight and review by the Texas Legislature by means of the Sunset Advisory Commission (Sunset) review. The review takes place approximately every 12 years, and involves an extensive process of information gathering and assessment before recommendations are made to the legislature on whether an agency or board should be continued, modified, or abolished. Sunset will present its recommendations regarding the current review to the Texas Legislature in 2005.

Regulatory boards of the Department of State Health Services Professional Licensing and Certification Unit — the Texas State Board of Examiners of Dietitians, the Texas State Board of Examiners of Perfusionists, the Texas State Board of Examiners of Marriage and Family Therapists, the Texas State Board of Examiners of Professional Counselors, the Texas Midwifery Board, and the Texas State Board of Social Worker Examiners — and the regulatory boards for acupuncturists, chiropractors, dietitians, physicians, optometrists, pharmacists, physician assistants, podiatrists, psychologists, and veterinarians will undergo Sunset review in 2005.

In addition to the Sunset staff reports on the regulatory boards, the Sunset staff has released its Licensing Reorganization Project (LRP) report, which contains recommendations on the creation of a new agency, the Department of Health Professions Licensing.

The 79th Legislature will likely address both structural issues relating to the various regulatory boards as well as scope-of-practice issues for the professions they regulate. Detailed information on the Sunset review process and related reports are available on the Sunset website at: <http://www.sunset.state.tx.us/>.

Protective and Regulatory Services

Under Executive Order RP33, issued by Governor Perry on April 14, 2004, the Health and Human Services Commission (HHSC) was directed to oversee the systemic reform of the Adult Protective Services (APS) program of the Department of Family and Protective Services (DFPS), following reports that indicated serious fundamental and systemic problems within the APS program. HHSC issued an initial report on the agency's response on May 19, 2004. Corrective actions to reform the APS program were outlined in an implementation plan issued July 12, 2004.

HHSC has worked with leadership offices to identify additional FY 2005 funding for sufficient staff in critical areas of the state, technological improvements related to investigations, and programmatic changes to better deliver services. This additional funding is included in the FY 2005 budgeted amounts in the Department of Family and Protective Services legislative appropriations request (LAR) document. The funding necessary for the continuation of staff and the other improvements for FY 2005, and additional staff to further reduce caseload per worker was requested as an exceptional item.

In July, 2004, Governor Perry ordered an investigation of the state Child Protective Services (CPS) program following news reports of a child's death in Dallas. Executive Order RP35, issued on July 2, 2004, ordered sweeping reforms of the CPS and APS.

Among the reforms ordered were expedited hiring of 123 new case workers, creation of financial incentives to retain the most experienced workers, and more stringent restrictions for closing cases. As in the case of APS and El Paso, a team of experts was also sent to Dallas to evaluate all high-risk cases.

Despite additional appropriations and resources that have been directed to CPS during the past three legislative sessions, the 79th Legislature will likely face requests for additional resources and legislation that will provide additional protection for a child in a life-threatening situation; upgrade technology to improve casework management; expedite initiation of face-to-face contacts with a child and their family and ensure appropriate follow-up contact; assess the safety and appropriateness of foster homes and other facilities; and establish more stringent requirements governing case processing. The legislature may also consider legislation to improve coordination between child protective services and the legal system to eliminate delays in removing children from dangerous situations.

In September, Governor Perry ordered that \$1.5 million be transferred from Workforce Investment Act funds at the Texas Workforce Commission for a new Internet-based training program at APS, more than six times the amount budgeted for caseworker training in the current fiscal year. The HHSC Ombudsman Office, in conjunction with

the Office of the Inspector General, has established a statewide toll-free hotline available 24 hours a day, seven days a week, for the public to report complaints about CPS.

Currently, the state spends \$324 million annually on CPS intake and investigations. Last year, CPS received 186,000 reports alleging abuse and neglect. The program completed more than 131,000 cases and confirmed that about 78,000 children had been subject to abuse or neglect in 2003.

In addition to addressing funding needs at DFPS, the 79th Legislature also may face other systemic problems within DFPS, including a perception that local CPS staff: are unresponsive, unwilling to share information, and overly controlling with respect to case events and case directions; lack the resources to provide services to families during the reunification process; lack the trust and support of community officials; overemphasize participation in a service plan, rather than the outcomes of each case; and are overwhelmed with new cases, open positions, and high turnover rates. Criticism has also been levied that caseworkers use shortcuts that result in predictable negative outcomes and that there is a lack of continuity as a child's case is transferred between caseworkers. Critics also cited management issues including the absence of a clear chain of command in many DFPS cases and a lack of a "family focus" in the handling of some cases.

Shortages of Health Professionals

A Texas Statewide Health Coordinating Council symposium on priority health care workforce issues, including nursing shortages, was held in Austin on March 4, 2004, to address possible changes in health care delivery methods to "address a predicted burgeoning need for primary care and chronic disease treatment" to be included in the *2005-2010 Texas State Health Plan*. The plan is provided as a resource to legislators, state government leaders, and others responsible for laws and policies related to health in Texas. Under Chapter 104, Health and Safety Code, the Texas Statewide Health Coordinating Council (SHCC) is required to develop a six-year State Health Plan with biennial updates that serves as a guide in the formulation of appropriate health workforce policy.

The draft plan identifies the state's continuing nursing shortage as the most critical need and suggests that a need for systemic changes in the delivery of health care in Texas exists. Some of the problems that the 79th Legislature may need to address include systemic shortcomings in health care quality; rapidly escalating health care costs at both the state and national levels; rising incidence rates of chronic disease that will be exacerbated by the aging of the "baby boomers" and the obesity epidemic; critical shortages in and poor distribution of health professionals; the swelling number of underinsured and uninsured; and disparities in access to and quality of health care, especially for minority populations which are growing at the fastest rate.

ISSUES FACING THE 79TH TEXAS LEGISLATURE

Texas was highest in state rankings for uninsured rates among children under age 19 as well as among adults under age 65 in 2001 and 2002. Minority populations remain seriously underrepresented in the health care professions. The Texas population of those over age 65 is expected to double from 2000 to 2030.

The plan suggests that health care workers are unavailable or that there are serious shortages based on geographic location in non-metropolitan areas and border counties. The state is also experiencing a decline in pharmacists and physicians in non-metropolitan areas, and the numbers of pediatricians per 100,000 children, internal medicine physicians, dentists, and registered nurses remain well below the rates for the United States as a whole. The ratio of psychiatric physicians has remained flat in Texas since 1998, but is lower than in 1992. While non-metropolitan areas have 13.6 percent of the Texas population, they have only 11 percent of the state's primary care physicians. The rates of new physician assistants and nurse practitioners have exceeded the rates for new physicians.

Many states, including Texas, are attempting to retain registered nurses and curb rising workforce shortages through scholarship and loan forgiveness programs to increase the number of people enrolled in bachelor's nursing programs. Texas legislators may also consider ways to increase the number of nurse educators, provide incentives such as childcare subsidies, and encourage employers to offer flexible hours and signing bonuses.

The 79th Legislature may also consider establishing and funding entry-level master's degree nursing programs to provide pre-licensure and master's degree-level nursing education to candidates who have baccalaureate degrees in non-nursing, but generally science-related fields providing financial assistance to state, community, and technical colleges to establish partnerships with health care institutions to increase the number of faculty members who are qualified to teach or train students to become registered nurses.

The allied health workforce is also suffering from shortages. The 79th Legislature may consider actions to help recruit and retain allied health professionals, including identifying recruitment and retention strategies for state institutions of higher education with allied health programs; and developing financial and other assistance to current and prospective students in allied health programs offered at public higher education institutions.

The 79th Legislature may also address the health professions shortages by addressing issues related to funding streams for graduate medical education; reviewing the role of the state's teaching hospitals in the provision of indigent care and in addressing health care needs of underserved regions of the state; addressing border and rural health care needs; reviewing consumer-directed care models; reexamining current and alternative methods of funding regional universities, community colleges, health science centers and

their reimbursement for the provision of indigent health care; and consolidating certain licensing agencies or their administrative functions.

Health Facility Regulation

American health facilities are continually challenged by staff shortages, patient safety issues and medical errors, uninsured patients, and the growth of specialty hospitals. As of 2002, the most recent year for which data is available from the American Hospital Association (AHA), there were 5,794 registered hospitals in the United States - community hospitals (non-governmental non-profit) hospitals, investor-owned (for-profit) hospitals, hospitals owned by state and local governments, and specialty hospitals (which include obstetrics and gynecology, rehabilitation, orthopedic, and other individually described specialty services). According to AHA, the number of rural and urban community hospitals is approximately equal—2,178 rural hospitals compared to 2,749 urban hospitals.

State legislators will likely face a number of issues relating to hospital staffing procedures. Providing adequate staffing to ensure patient safety, while efficiently utilizing staff to minimize operational costs and improving working conditions, are issues that may need to be addressed. The nursing shortage has resulted in many facilities using temporary staffing agencies and other means to augment their nursing staff, and the use of such measures has raised concerns about the skill mix and differences in licensing, areas of specialization, education, training, and experience among direct-care nursing staff in meeting the needs of patients.

In 1999, California's legislature enacted a law imposing a standard for patient-nurse staffing ratios of one nurse on staff for every six patients in medical and surgical units. The ratio will be reduced to one nurse for every five patients in 2005. Other state legislatures have considered measures with standards similar to those enacted in California, but none have enacted legislation. Establishing standards for base staffing and skill mix has been used as an alternative to the staff-to-patient ratio approach.

As a result of the nursing and allied health shortages, many of these professionals are working mandatory overtime to maintain staffing levels in health facilities. Mandatory overtime can potentially lead to health risks for nurses as well as a decrease in the quality of care provided to patients. The legislature may review policies relating to mandatory overtime and the implications of such policies for patient care.

The November 1999 report, *To Err is Human: Building a Safer Health System* by the Institute of Medicine (IOM) indicated that many people die in hospitals each year as a result of medical errors. Staffing shortages and quality control problems at health facilities exacerbate the problem.

The legislature may consider legislation that would address hospital and health facility reporting requirements; medication errors; and monitoring systems related to patient safety.

Reporting requirement legislation would increase the number and frequency of reported medical errors from health care providers through mandatory or voluntary means, and by including language that would prevent health facilities from disciplining employees who report errors, the reporting rates might be increased.

Such reports might contain information such as the type of medical error, the name of the facility, and the date, time of notification, and a patient safety plan that would provide an ongoing analysis and application of evidence-based patient safety practices.

Medication errors ultimately increase health care costs through prolonged hospitalization, extensive testing, increased drug therapy, and additional monitoring. Such injuries and costs may be reduced if hospitals and providers implement programs to prevent and detect medication errors. H.B. 1614, 78th Legislature, Regular Session, addressed reporting of medical errors and the establishment of patient safety programs in hospitals, ambulatory surgical centers, and mental hospitals, and provided for an administrative penalty. It also required a report to be submitted to the legislature. The 79th Legislature may consider legislation to enhance medication error reporting.

Hospital Emergency Departments

Health facilities in Texas and throughout the nation are faced with overcrowding in their emergency departments as a result of facility closures and an increasing uninsured population accessing health care services through these departments. This overcrowding has resulted in excessive patient waiting times, increased transport times for ambulance patients, and financial burdens for the hospitals. Overcrowding has also taxed the ability of emergency department personnel to provide quality patient care.

Fewer patients with private health insurance coverage coupled with increasing denials of coverage for those who do have insurance, as well as reductions in Medicare, Medicaid, and managed care reimbursement rates have significantly reduced hospital resources. The lack of community resources for low-income Medicaid recipients and the uninsured have lead to the increased use of hospital emergency departments for primary care. The lack of physicians in certain areas has had a similar effect. Hospitals have been forced to compensate for these trends by operating fewer inpatient beds, thus reducing the resources available to accommodate admissions from emergency departments. Hospital closures, especially in rural areas, have further exacerbated the problem. Hospitals that are serving more diverse populations from wider geographical areas are increasingly seeking to obtain payment from patients prior to discharge in order to reduce debt. Patients who seek nonemergency care are increasingly being asked to pay at least a

percentage of their bills before they leave and, in some cases, before they receive treatment.

Communities with overloaded emergency departments are also experiencing some level of ambulance diversion. This increases the risk of liability for the hospitals and may contribute to a reduced level of care for the patients.

Legislators may consider a variety of initiatives including funding, operational standards, emergency preparedness needs, and other mechanisms to relieve overcrowding in hospital emergency departments, and ways to provide hospitals with some degree of immunity from liability.

Lawsuits have been filed in a number of states regarding hospital billing practices for uninsured patients. Legislators may also consider legislation to limit the amount health care providers may charge uninsured patients for medical procedures.

Regulation of Niche or Specialty Hospitals

Specialty hospitals, facilities that specialize in care for certain conditions or perform certain procedures, currently represent a comparatively small segment of the health care industry. However, the growth rate of the niche or specialty hospitals has been rapid and has generated concerns that such hospitals often do not serve the broader community and carve out the more profitable portions of general hospitals' business. By luring well-insured patients from general hospitals, it becomes more financially difficult for general hospitals to fulfill their broad mission to serve a community's needs, including emergency services, charity care, and disaster response.

The Medicare Prescription Drug Improvement and Modernization Act of 2003 included an 18-month moratorium on new physician-owned specialty hospitals to enable the United States Department of Health and Human Services and the Medicare Payment Advisory Commission to study the issue.

The 79th Legislature may consider legislation on specialty or niche hospitals including requirements for licensure, level of care clinical standards, and referral and reporting requirements.

Health Insurance

In 2003, 25 percent of the Texas population was uninsured according to a report by the Urban Institute and Kaiser Commission on Medicaid and the Uninsured based on Current Population Surveys produced by the United States Census Bureau. For the United States as a whole, the rate of uninsured is 16 percent. Given the rapidly growing population in

the state and the already overburdened health care system, the rate of uninsured Texans is a growing area of concern.

The 79th Legislature may consider options to increase health care coverage that could include subsidizing private insurance in lieu of Medicaid and CHIP where feasible; increasing the use of consumer-directed care models; reimbursing providers based upon outcomes; increasing the federal match for currently unmatched local funds; developing and expanding Health Insurance Flexibility and Accountability waiver options relating to premium subsidies; expanding local models for delivery of Medicaid; and expanding access to mental health services through expansion of a behavioral health organization model.

Other related issues that may be considered include expansion of “bare-bones” health coverage plans, medical savings accounts, small employer purchasing alliances, tax credits or deductions, and premium assistance programs, among others.

Medicaid Cost Containment

H.B. 2292, enacted by the 78th Legislature, Regular Session, included a number of changes to the state's Medicaid program that were designed to contain costs. Included in these cost containment measures were provisions that maintained the term of continuous eligibility periods for children at six months; implemented more comprehensive assets verification procedures; required a face-to-face interview for initial eligibility determination if eligibility cannot be determined through mail correspondence and for renewal of coverage if eligibility cannot be determined through a telephone interview or mail correspondence; established cost-sharing (copayments and monthly premiums) based on federal maximum levels; required compliance by adult cash assistance recipients with a personal responsibility agreement to maintain Medicaid coverage; changed coverage thresholds for adult pregnant women and medically needy adult clients; authorized prior authorization requirements for high-cost medical services, disease management programs, expansion of managed care, and guidelines for appropriate usage of out-of-network providers; established a Preferred Drug List (PDL), with prior authorization required for prescribed drugs not on the PDL, and limits on prescription medications; discontinued coverage for certain optional Medicaid services (eyeglasses, hearing aids, podiatric, chiropractic, and psychological services) for adults over age 21; authorized estate recovery of Medicaid expenditures pursuant to federal requirements; and discontinued reimbursement of Graduate Medical Education and reduced provider reimbursement rates.

The efficacy of these measures and other cost containment and fraud control measures, as well as contracting issues, related to Medicaid and the Children's Health Insurance Program may be considered by the 79th Legislature.



CRIMINAL JUSTICE

Identity Theft

Because identity theft is one of the fastest growing crimes in the United States, the Senate Criminal Justice Committee was charged during the interim with the study of identity theft its effects, and the impact of recent legislation addressing the issue (H.B. 2138, S.B. 473, and S.B. 566, 78th Legislature, Regular Session).

Credit card "skimming" is a method by which information encoded in a magnetic strip of a credit card is gathered by an electronic card reader, or skimmer. H.B. 2138 provided that it is an offense (Class B misdemeanor) for a person to use a skimmer or re-encoder to access, read, scan, store, or transfer the information encoded on a payment card's magnetic strip without the consent of the card's authorized user.

The legislature may continue to monitor the effectiveness of H.B. 2138, with assistance and feedback from the consumer protection division of the Office of the Attorney General.

A victim of identity theft is often embroiled in a long process of clearing his or her credit history, financial affairs, or even criminal records. S.B. 473 allows a victim of identity theft to place a freeze, for a modest fee, on his or her credit report and provides for the confidentiality of social security numbers.

The legislature may examine the rationale for credit agencies requiring a police report prior to authorizing a credit history security freeze as requested by a consumer.

Once the true identity of a person has been determined in an identity theft case, S.B. 566, 78th Legislature, Regular Session, requires local law enforcement authorities to contact the person whose identity has been falsely used. It also requires notification that he or she is entitled to an expunction of a criminal record due to acts associated with the theft of his or her identity and establishes an application process for a person seeking the expunction (the application may be filed through the state attorney general). The arresting agency must also notify the Department of Public Safety. The process of expunction requires verification of the application, including fingerprint records and other identifying information.

The legislature may further consider the procedures for the timely notification and expunction of an innocent identity theft victim's record.

Incorporating image verification or facial recognition technology into the Texas driver's license system would allow the state to utilize an existing database of driver's license and identification card images to compare photographs, identify multiple records, and verify the applicant's identity at the time of issuance, thus stopping individuals from acquiring multiple driver's licenses. DPS testified that 11 states are successfully utilizing this technology in their driver's license systems.

The legislature may consider incorporating image verification technology into the Texas driver's license system and its effect on reducing identity theft.

The legislature may also consider authorizing additional staff for the DPS driver's license fraud unit to increase the state's ability to pursue allegations of identity theft.

Prison System Population Growth

The Legislative Budget Board Criminal Justice Data Analysis Team (CJDAT) issued its long-term adult correctional population projections on June 8, 2004. CJDAT assumed the data analysis responsibilities of the Criminal Justice Policy Council, which ceased to exist on September 1, 2003. CJDAT projections suggest that the prison population will continue to increase, beyond the operational FY 2006 capacity, and beyond the available population capacity in FY 2008.

CJDAT projections show that the adult community supervision direct population will decrease continually through FY 2009.

The legislature may examine ways to expand TDCJ institutional division capacity to accommodate a growing prison population, redirect prisoners to alternative programs, or create timelier processing of the growing offender population.

Parole Guideline Policies

The Texas Board of Pardons and Paroles (BPP) makes recommendations on clemency matters to the governor and determines the:

- prisoners to be released on parole or discretionary mandatory supervision;
- conditions of parole and mandatory supervision; and
- revocation of parole and mandatory supervision;

The LBB has assumed that the BPP approval rate for parole release will be 30 percent for 2004 through 2009 and 57 percent for discretionary mandatory supervision for the same period. Accurate and consistent parole projections are critical to planning correctional budgets for the state.

The legislature may consider redefining the BPP's guidelines for release decisions, reducing the BPP's discretion, and requiring the BPP to clearly state the reasons for parole denials.

The legislature may also consider mandating reports on releases and monthly statistical reports, rather than annual statistical reports.

Additionally, the legislature may examine ways to expedite the release of medically recommended intensive supervision (MRIS) offenders, and to reduce state expenditures for the MRIS population.

Capital Punishment

In 2002, the United States Supreme Court in *Atkins v. Virginia (Atkins)* ruled that the execution of mentally retarded persons is “cruel and unusual punishment” and therefore prohibited by the Eighth Amendment to the United States Constitution. The court concluded that because mentally retarded persons have diminished cognitive and behavioral capacities, they should be categorically excluded from execution. However, the court declined to define “mental retardation,” leaving it to the states to develop appropriate ways to enforce the constitutional restriction upon the execution of mentally retarded persons.

The 77th Legislature enacted a bill that barred the execution of a mentally retarded defendant, defined mental retardation, and set out a procedure for presenting evidence of mental retardation in a capital murder trial, but Governor Perry vetoed the bill. Similar legislation was introduced during the 78th Legislature, Regular Session, but was not enacted. The 79th Legislature may consider revising Texas' death penalty laws to define mental retardation and expressly prohibit the execution of the mentally retarded in accordance with *Atkins*.

Another issue that has been debated during past legislative sessions, and may again be considered by the 79th Legislature, is giving juries in capital cases the option of sentencing a defendant to life without parole. Under the current legal system, jurors have only two choices in capital cases if they determine the defendant is guilty—the death penalty or life in prison; under the latter, an inmate is eligible for parole after 40 years.

Crime Victims' Compensation Fund

The Crime Victims' Compensation (CVC) Fund was established in 1979 by the 66th Legislature to assist victims of violent crime in Texas. Last year, 204 grants were awarded to public and non-profit agencies that provide victims services that include guiding child victims through the court process, offering counseling and support to battered women, accompanying sexual assault survivors to the emergency room, assisting

survivors of drunken driving incidents in completing victim impact statements, and helping families of homicide victims gather necessary documents for their compensation application.

In an April 13, 2004, letter to the Senate Criminal Justice Committee, Texas Attorney General Greg Abbott stated that appropriation of CVC funds to other agencies have increased from \$13 million in the 2000-2001 biennium to almost \$114 million in the 2004-2005 biennium, with some appropriations going to programs not directly related to crime victims.

Additionally, Abbott stated that by the 2006-2007 biennium, the CVC Fund will not have enough money available to meet the current level of appropriations and will be headed toward insolvency. Abbott said that under current law, the state will be unable to certify enough excess funds in the next biennium to meet demands, and that the diversion of money from the fund will cripple its ability to provide compensation for the legally intended beneficiaries.

The legislature will likely address issues relating to the diversion of funds from the CVC fund and measures designed to ensure the solvency of the CVC Fund.

Foreign Citizens Serving Sentences in Texas Prisons

A November, 2003, report by the Texas Department of Criminal Justice entitled *Offenders with Foreign Place of Birth and Citizenship*, stated that 9,777 Texas inmates were identified as foreign born and having foreign citizenship. Additionally, 3,510 inmates had been served with a final order for deportation through the United States Immigration and Naturalization Service (INS). Of the 3,510 inmates, 2,290 were parole eligible and could be released to parole for deportation.

The legislature may consider mandating that parole-eligible inmates with deportation orders be released to the INS. The legislature may also establish a working group to develop Texas' use of the federal prisoner international treaty for the execution of penal sentences.

Crime Laboratory Accreditation

The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards for which such labs can receive formal certification.

A laboratory's quality assurance program should also include proficiency testing, continuing education, and other programs to help the laboratory provide better overall service to the criminal justice system.

Laboratories have been gaining accreditation for more than twenty years under the ASCLD/LAB Legacy Program.

Following recent difficulties with DNA evidence testing and examination of operations in the Houston Police Department Crime Laboratory, an independent audit detailed a wide-range of deficiencies in that laboratory's DNA analysis section. Some of the deficiencies included the potential for evidence contamination and a lack of basic recordkeeping. The Houston Police Department Crime Laboratory DNA section has operated as a non-accredited laboratory and as such has not conducted in-depth internal or external audits that accredited laboratories conduct each year relating to evidence testing, examinations, and procedures.

As a response to this problem, H.B. 2703, 78th Regular Session, amended the definition of "forensic analysis" to specifically include DNA evidence testing and examination. The bill also required the public safety director (director) of the Texas Department of Public Safety (DPS) by rule to establish an accreditation process for crime laboratories, including DNA laboratories, and other entities conducting forensic analyses of physical evidence for use in criminal proceedings. H.B. 2703 requires the director by rule to regulate DNA testing, including regulation of DNA laboratories.

Initial rules for an accreditation process for crime laboratories required under H.B. 2703 were established in Chapter 28, Subchapter H, Texas Administrative Code, and implemented in 2003. Additional rules have been proposed by DPS and are pending final approval.

The legislature may consider additional measures to regulate DNA testing, including the regulation of DNA laboratories and an accreditation process for all Texas crime laboratories.

Criminal Records

A concern has emerged regarding Article 55.03(1) (Effect of Expunction), Code of Criminal Procedure, as amended by S.B. 1477, 78th Legislature, Regular Session. Some district attorneys and defense attorneys believe that Article 55.03(1) is in conflict with Article 55.02 (Procedure for Expunction) and Article 55.04 (Violation of Expunction Order). Article 55.03(1) was amended to add that the release of information is prohibited other than for a purpose described by Section 411.083 (a), (b)(1), (2), or (3) in the Government Code. The changes apply to a person seeking an expunction on or after the effective date of S.B. 1477 (September 1, 2003). The Government Code provisions relate

to prohibiting the dissemination of criminal history record information by the DPS, except to criminal justice agencies; non-criminal agencies authorized by statute to receive criminal history information; and the person who is the subject of the criminal history. The provision conflicts with Article 55.04 which provides that it is a Class B misdemeanor to knowingly fail to obliterate the record or expunged file, or for an employee of a state agency to release or disseminate or otherwise use files that he or she knows are the subject of an expunction order. Some district attorneys and defense attorneys believe that language added to Article 55.03 by S.B. 1477 has allowed DPS to create a non-public record of expunged arrests and that the language should be deleted to resolve the conflict.

The legislature may consider legislation to resolve any conflict in the Code of Criminal Procedure between provisions relating to the expunction of criminal records.

Specialized Police Agencies and Officers

Article 2.12 (Who Are Police Officers), Code of Criminal Procedure, has been amended each of the last 11 regular legislative sessions to expand the definition of Texas peace officer and to increase the number of agencies and commissions authorized to commission, appoint, and employ peace officers. Currently 34 separate categories of peace officers are authorized under Article 2.12, including a proliferation of specialized police.

The legislature may consider legislation to restrict the designation of persons as peace officers by agencies, districts, and organizations.

The legislature may also consider legislation to reorganize specialized police agencies into a separate category to clarify their duties, responsibilities, and privileges.



EDUCATION

Public Education

School Funding

The state's public school funding system, the foundation school program (FSP), will be reviewed by the 79th Legislature. In the 2002-2003 school year, the FSP distributed \$34 billion.

The FSP has three tiers. Theoretically, tier one supports the education requirements of state law, and tier two provides funds for enrichment to meet community expectations. Tier three provides some facility funding. For several years, school boards and administrators, legislators, and interest groups have agreed that tier one does not provide sufficient revenue to fund the state requirements for accreditation and accountability. The recent state district court decision in *West Orange-Cove v. Neeley* found that for a significant number of districts, the cost of state requirements exceeds revenues available in tier two as well.

In 1984, the legislature adopted a system of weights (or percentages) that increase state funding based on district size, location, and student population in order to more fairly distribute revenue to districts with higher costs. Weights increase the student count (average daily attendance or ADA) by 35 percent, producing a weighted average daily attendance (WADA).

The basic allotment undergirds the FSP. It provides \$2,537 per WADA for a minimum tax rate of 86 cents, or \$29.50 per WADA per penny of tax rate. The basic allotment is adjusted for district characteristics. Size and geographic costs are represented in the cost of education adjustment (most often called CEI, a former acronym) and in the small, mid-size, and sparse adjustments. These modifications produce the adjusted basic allotment (ABA).

Each special program—including compensatory education (based on the percentage of students eligible for school lunch programs), special education, gifted and talented, bilingual, and career-and-technology—has a weight that is multiplied by the ABA. The transportation allotment also increases the tier one yield.

The guaranteed yield, called tier two, provides \$27.14 per WADA for each penny of tax rate between 86 cents and \$1.50. The operations and maintenance tax rate (M&O tax rate) is capped at \$1.50 to limit the ability of property-wealthy districts (Chapter 41

districts) to raise revenue at higher tax rates. During the 78th Legislature, Regular Session, legislators approved the payment of \$110 per student to each school district without regard to the property value of the district.

The Texas Education Agency (TEA) has requested an increase in tier two funding to \$29.95 per WADA per penny, which would reduce the revenue gap between the FSP and the Chapter 41 districts.

The legislature may consider modifying the M&O tax cap above \$1.50 and equalizing tier two to the same tax rate.

The "Robin Hood" Plan

The school finance recapture plan known to some as "Robin Hood" was developed by the legislature in 1993 to reduce the disparities in school district tax bases. For example, in 1988, the Allamoore Independent School District in Hudspeth County had a tax rate of 19.7 cents on its property tax base of \$6.9 million per student that yielded \$12,340 for each of its three students (Snapshots, TEA, 1988-89). Hudspeth County had 738 students enrolled in three other districts, one of which had a \$1.09 tax rate that produced \$2,897 of property tax revenue; state aid added \$2,400. The average property value per student in the four Hudspeth County districts was nearly \$2 million, but because most of the high-value property was set apart in one district, state aid for the other three districts totaled \$1.12 million that year.

In the 1989 *Edgewood Independent School District et al. v. Kirby et al. (Edgewood I)* decision, the Texas Supreme Court found that the school finance system was unconstitutional because the value of school districts' property tax bases determined the quality of education and school facilities in the individual districts. In *Edgewood I*, the Supreme Court required the legislature to provide "substantially equal access to similar revenues per pupil at similar levels of tax effort." That central principle has remained intact although *Edgewood III* allows "unequalized enrichment so long as efficiency is maintained."

In 1991, the legislature decided that funding for all districts could not be elevated to the level of the wealthiest districts and that the tax yield of the highest wealth districts had to be controlled. The first equalized system, adopted in 1991, consolidated school district property tax bases at the county level, which the Texas Supreme Court subsequently rejected as illegal taxing districts under the Constitution of 1876. The 74th Legislature then required districts with high-value tax bases to choose one of four options to lower their taxable value, an approach which the supreme court accepted. If a school district board fails to select one of the four approved options, the commissioner of education was authorized to detach and annex property. Local school boards predominantly chose

paying attendance credits to the state to comply with statutory and constitutional requirements for an equalized school finance system.

Subsequent school finance bills raised the required minimum tax rate for participation in the FSP, the maximum tax rate qualifying for state aid, and the property wealth limit. The FSP provided an incentive for school boards to raise tax rates and maximize funding at the same time that the legislature installed a test-based accountability and accreditation system.

Currently, recapture begins when a district's property tax base tops \$305,000 per weighted average daily attendance (WADA). WADA increases the student count by 35 percent to provide for cost differences among schools and students. The state guarantees a tax yield of \$27.14 per WADA, which is equivalent to a \$271,400 per WADA tax base.

In 2003, the value of property in the state totaled \$1.207 trillion, as determined by the Property Tax Division of the Comptroller of Public Accounts (comptroller). Exemptions, property-value caps, and abatements reduce the taxable value to \$1.06 trillion. Statewide, each penny of property tax rate yields \$110 million through the FSP. To reduce the property tax rate by 75 cents, as some propose, the legislature would need to raise at least \$8.25 billion, the cost of reducing local tax rates by one cent.

Of the total property value, single-family residences account for approximately \$593 billion before exemptions. Other residential property adds an additional \$60 billion. After exemptions, all residential property accounts for approximately \$500 billion of property value. Exemptions and tax freezes take value out of the tax base and result in higher tax rates on the remaining value.

Even after recapture, property wealthy districts have a higher tax yield per penny of tax rate per WADA than all other districts. Few property wealthy districts are based solely on high residential property value; most property-wealthy districts benefit from commercial, industrial, utility, oil, gas, and mineral properties located in those districts.

In mid-September, state district Judge John Dietz, ruling in *West Orange-Cove v. Neeley*, found the state funding system unconstitutional. The November 29 Final Judgment states that:

- The \$1.50 M&O tax rate "has become both a floor and ceiling denying school districts 'meaningful discretion' in setting their tax rates";
- The cost of a "general diffusion of knowledge" (which Dietz characterized as adequacy) exceeds the maximum revenue available through the funding formulas;

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- The funding system is "inefficient, inadequate, and unsuitable," failing to support the costs of meeting the legislature's statutory definition of a comprehensive adequate program;
- The prohibition of using tier two for facilities funding, "combined with the legislature's failure to make the IFA [instructional facility allotment] or EDA [existing debt allotment] statutorily permanent" and to provide adequate funding for IFA results in property-poor districts not having substantially equal access to facilities funding; and
- The "current funding capacity fails to provide districts with sufficient access to revenue to provide access to a GDK [a general diffusion of knowledge]" especially in light of the "inadequacy of the weights for bilingual, economically disadvantaged, and other special needs students," and the disproportionate concentration of bilingual and economically disadvantaged students in some districts.

The 79th Legislature will likely consider changes to the foundation school program.

During the 78th Legislature, many different tax combinations were discussed, including broadening the corporate franchise tax to include all business activity, broadening and raising the sales tax, and increasing other taxes. Both the house and the senate considered proposals that would have reduced the district tax rate cap by 10 to 25 cents, and there was some discussion of a 75 cent reduction.

Reducing the property tax cap would not remedy the school boards' lack of discretion in setting tax rates. The legislature may consider the issue of tax capacity during the session.

Facilities

In *Edgewood v. Kirby (Edgewood I)*, the Texas Supreme Court identified facilities as the most obvious result of the unconstitutional funding system because state law prohibited districts from using any state funds for facilities. Many poor districts could not sell bonds because their tax bases had so little value. In subsequent *Edgewood* decisions, the justices removed the bond tax rate from recapture and unequalized enrichment was authorized so long as it did not undermine the FSP equity.

In 1997, the legislature created a facilities tier, called tier three, and prohibited districts from using tier two tax revenue for facilities. The instructional facility allotment (IFA) has two parts, one for new facilities debt and another for existing debt. Both are equalized to yield \$35 per ADA. Districts are ranked by property wealth, enrollment growth, and previous eligibility, and TEA distributes facility funds until the funding is exhausted.

To be eligible for IFA, districts must pass a bond election before the state commits to equalize the bond tax yield. The existing debt allotment (EDA) equalizes funding for bonds issued before the current biennium. The statute guarantees that IFA state aid will continue until the bonds are fully paid.

School districts issue an average of \$3 billion in bond debt each year because of the rapid growth in enrollment and the need to update facilities. In the 2003-2004 biennium, the legislature provided \$272 million for IFA. For the 2005-2006 biennium, IFA funding dropped to \$20 million although over \$1.49 billion was appropriated to pay existing bond commitments.

Another issue on bond debt involves the permanent school fund (PSF) bond guarantee program. The PSF guarantees investors that school bond payments will continue and qualifies school districts for the lowest interest rates. Internal Revenue Service (IRS) rules limit the bond guarantee program to 250 percent of the PSF's cost or market value. While the state and the IRS calculate the cost and market value differently, the bond guarantee program has reached its capacity, according to TEA. The IRS will have to increase the limit to enable Texas to continue using PSF to guarantee school bonds. The 78th Legislature requested this change.

The 79th Legislature may consider alternative methods for guaranteeing school bonds unless the IRS increases its 250 percent limit for debt guarantees. In addition, the legislature may consider an additional funding source for the IFA and EDA and the consolidation of the two into a single facilities tier.

Weights

Weights are controversial because some believe the weights are too low and others oppose using weights. Some have proposed applying weights to tier one but not to tier two or tier three. Others argue that using weights encourages school districts to inappropriately classify students to draw extra funding. Whether weights are adequate or appropriate, school districts are required by state and federal law to provide services to qualifying students.

Weights have not been changed for the last decade because revising the system would change the distribution of state aid among districts. The issue of weights may be reviewed by the 79th Legislature.

Compensatory Education Funding

Fifty-one percent of the state's student population is classified as low-income. These students qualify for the National School Lunch Program and draw a 20 percent weight in state compensatory education funding. Schools may use that funding only for

supplemental programs and services designed to eliminate disparities in performance on the Texas Assessment of Knowledge and Skills (TAKS) or in high school completion. Programs designed to prevent students at risk of dropping out of school can also be funded by the compensatory education funds.

Some people argue that compensatory education funding is distributed to districts based on family income and spent based on performance or at-risk status. They believe that compensatory education funding should be based on the number of students who need additional instruction to meet TAKS standards and spent only for that purpose. In addition, some believe that more students would qualify for compensatory education if funding were based on low performance rather than on family income. If funding were based on low performance, urban districts likely would lose funding to suburban districts.

The 79th Legislature may review issues relating to the basis for and use of compensatory education funding.

Tiers

Some have advocated creating a single-tier FSP to simplify the system and to provide an equal tax yield for each penny of tax rate; one proposal provided a single tier with the yield equal to the wealth limit of \$30.50 per penny per WADA. Increasing the amount of either tier one or tier two will reduce the upward pressure on district tax rates.

The legislature may consider a single-tier school funding system.

Enrollment

Currently, Texas has 4.35 million students, and the commissioner of education (commissioner) forecasts an increase of 80,000 students each year of the 2005-2006 biennium. Adding 80,000 students would require an increase in school budgets of \$560 million dollars, assuming \$7,000 per average daily attendance (ADA).

Calculating attendance for the purpose of FSP funding has been discussed. Currently, the system uses ADA rather than actual enrollment. ADA is calculated by summing the total attendance for every school day and dividing the sum by the number of school days, with a few exceptions. Some argue that using ADA provides schools the incentive to maximize attendance. Others counter that schools must have the classrooms, curriculum materials, and teachers required for the number of students enrolled whether a student attends or not; therefore, enrollment should be the basis for funding.

The 79th Legislature may review issues related to the method used to calculate student attendance.

At-risk Funding

During the 78th Legislature, Regular Session, members of the budget working group on education questioned the number, effectiveness, and efficacy of programs targeting students at risk of dropping out of school. As a result, the General Appropriations Act, 78th Legislature, Regular Session, included Rider 69, Article III, directing the Legislative Budget Board (LBB), the State Auditor's Office (SAO), and Texas Education Agency (TEA) to evaluate programs for at-risk students and to create a standard set of results-based performance measures to compare the effectiveness of all programs that receive at-risk funds.

In FY 2004 the state appropriated \$15.6 billion to public education. Of that, 17.5 percent (\$2.7 billion) was spent on programs targeting the 40 percent of enrollment classified as at-risk (1.7 million students). Of the \$2.7 billion, state funds totaled \$1.4 billion and federal funds provided \$1.3 billion. In addition, the United States Department of Education provided an additional \$81.9 million directly to school districts, and local school districts provide an additional \$1.1 billion. Approximately \$2,300 per student of state, federal, and local funding is spent for research, development, administration, implementation, and training costs in addition to direct student services.

The LBB, SAO, and TEA identified and analyzed 26 programs, but there are more than 40 additional programs serving at-risk students. SAO identified best practices to improve student performance and found that all at-risk student groups had improved Texas Assessment of Knowledge and Skills (TAKS) performance at a higher rate than non at-risk white students. Because most at-risk program funding is combined at the district level, SAO was not able to determine which programs were more cost-effective.

The 79th Legislature may consider consolidating funding for at-risk programs, to concentrate funding on programs that use best practices, requiring strict accountability for outcomes and efficiency, and requiring specific outcome measurements.

Textbooks

The cost and availability of textbooks has become an issue of concern to some legislators. Textbooks have a dedicated funding source from the permanent school fund, but the legislature has delayed some purchases to stay within budget guidelines for the last two biennia. Currently, about \$575 million is needed to catch up with current proclamations.

Each year, the State Board of Education (SBOE) issues a proclamation announcing the subject areas, grade levels, maximum cost per textbook, and estimated units of textbooks and instructional materials that will be purchased three years hence. Because of the budget shortfall, SBOE did not issue proclamations in 2003. Publishers begin a two-year development process and provide copies of their proposed textbooks for SBOE review.

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After review and public testimony, SBOE adopts lists of conforming (textbooks that include material on each of the Texas Essential Knowledge and Skills (TEKS)) and nonconforming (those with at least 50 percent of TEKS items) textbooks.

School districts order textbooks through the TEA and receive the textbooks directly from the publishers. Textbooks are used for at least six years. A school district may order textbooks for 103 percent of the previous year's enrollment; before the current biennium, the state funded textbooks for 110 percent of enrollment. Many school districts' growth rates exceed three percent a year, and the districts must buy additional textbooks with local funds. Districts may use local funds to purchase used textbooks.

Twenty-one states have a state policy on textbook purchases and either adopt, recommend, select, or limit district choice.

Electronic textbooks have become an issue of interest. The two reasons most often cited for this interest are cost savings and up-to-date content. Currently, an approved textbook cannot be altered during its six-year use cycle, and a significant change would not appear in a traditional textbook until the next adoption. Electronic textbook content can be updated in a more timely fashion.

The legislature may consider changes in the SBOE textbook adoption process, funding for textbooks, limitations on cost, and the use of electronic materials.

School Start Date

In 1990, the 71st Legislature repealed the requirement that schools start in the week that includes September 1. As a result, many districts moved the first school day to mid-August or earlier.

Tourism officials complained that the shortened summer impinged on their traditional three-month season. Beginning in 1997, the 75th Regular Session, Senator Lucio filed legislation moving the start date back to the traditional post-Labor Day start. The 77th Legislature passed S.B. 108 requiring districts to obtain a waiver to begin the school year prior to the week in which August 21 fell.

In September, 2004, the comptroller produced a study of the issue, *Saving Summer: Lessons Learned*. The study projected that an early August school start date cost \$790 million in lost wages and additional expenses. The report attributed the early start date to more student vacation days, rather than a longer school year, noting that the school year is the same length as in 1949.

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The 79th Legislature may consider redefining the school year as 1,250 hours as well as 180 days to allow districts to reduce the number of instructional days by lengthening the time of the remaining school days.

End-of-Course Assessment

Some members have discussed reinstating high school end-of-course assessments in core subjects in place of the 11th-grade exit-level Texas Assessment of Knowledge and Skills (TAKS). In 1995, the 74th Legislature enacted legislation requiring students to pass either the exit-level statewide assessment or the end-of-course assessments in Algebra I, English II, and either Biology I or United States history. The end-of-course exams were eliminated by S.B. 103, 76th Legislature, which required the State Board of Education to create a new assessment that tests a broader curriculum and includes an 11th-grade exit-level test that evaluates core academic knowledge and skills needed for success in higher education and business.

The 79th Legislature may reconsider the issue of required end-of-course exams.

Teacher Termination

The 74th Legislature established a process to place an underperforming teacher on probationary status; to terminate a teacher on a probationary contract with notice delivered 45 days before the contract's end; and to discharge or suspend a teacher at any time for good cause as determined by the local school board. This may again be a topic for consideration.

The 79th Legislature may consider legislation relating to teacher termination procedures.

Vouchers

Vouchers are a means used to redirect public tax dollars from public education to private and parochial schools. Proponents say vouchers would make schools more competitive and help minority children who cannot afford private schools. Opponents say a voucher system would undermine the public schools system by diverting scarce resources. Although the issue of vouchers has been addressed in previous sessions, no legislation has passed creating a voucher system, and voucher programs remain controversial.

The 79th Legislature may consider legislation relating to vouchers, including the creation of a pilot voucher program in the state's six largest school districts for educationally-disadvantaged students and those eligible to transfer to another district based on TAKS performance.

Charter Schools

Authorized by Texas law in 1995, charter schools are public schools founded by parents, teachers and social services organizations designed to foster educational competition and offer parental choice in education. Charter schools receive the same per pupil expenditure for maintenance and operations as other Texas public schools, but they do not receive capital funding. Proponents support charter school autonomy and freedom to be innovative in educational and administrative practices. Opponents express concerns about accountability and the lack of regulation.

The 79th Legislature may consider legislation relating to charter schools. Issues that may be discussed include student performance, operators' compliance with charter requirements, facilities funding, and bond debt guarantees, limiting the number of campuses that may be operated under one charter, and placing charter school funding on par with independent school district formula funding, including per pupil multipliers for small enrollment and special program allotments.

Juvenile Justice Alternative Education Programs (JJAEP)

A Juvenile Justice Alternative Education Programs (JJAEP) is an educational program operated by the juvenile board of a county to serve expelled students pursuant to Chapter 37 (Discipline; Law and Order), Texas Education Code.

Legislation relating to JJAEPs is likely to be considered by the 79th Legislature, including legislation that eliminates the requirement that counties with populations between 125,000 and 300,000 operate JJAEPs.

Higher Education

Student Financial Aid

As mandated by S.B. 286, 78th Legislature, Regular Session, the Texas Higher Education Coordinating Board (THECB) reviewed student financial aid. The THECB study found that students, families, and the staff of student-aid offices in institutions of higher education (IHE) are overwhelmed by the number and complexity of student aid programs. THECB recommendations to address these problems include:

- Creating a dedicated funding source for state financial aid to support a continuous and predictable program that will motivate students to attend IHEs;
- Developing and providing comprehensive financial aid training for counselors, community-based organizations, and others to be reliable information sources;

- Expanding THECB programs for non-traditional students and for the common application initiative to include community colleges in the program that created one standard application form for all state four-year institutions of higher education (IHEs) so that a prospective college freshman can submit the same application to several IHEs;
- Using the Texas Assessment of Knowledge and Skills (TAKS) to encourage students to meet the college-readiness standard;
- Helping students to pay for tuition, fees, books, and supplies by requiring IHEs to allow students to register prior to disbursement of financial aid, by making state financial aid funds available at the start of the academic year in August, by providing \$581 million for Pell-like state grants, by expanding the emergency tuition and fee loan program to include books and supplies, and by providing more payment options in the tuition and fee installment plan;
- Maintaining, coordinating, and fully funding the major state aid programs: TEXAS Grants I and II, the Texas B-On-Time Program (BOT), the Texas Public Education Grant Program (TPEG), the Tuition Equalization Grant Program (TEG), and the Texas College Work-Study Program;
- Revising existing aid and waiver programs to lessen the administrative burden, to remove conflicting and confusing requirements, and to speed aid to students; and
- Basing any additional merit requirements for aid on criteria that reflect the student's academic ability in the context of the applicant's P-12 educational opportunities, that continue to include need, and that include multiple measurements of a student's academic performance.

The 79th Legislature may consider legislation to address the deficiencies and recommendations identified in the THECB's *Financial Aid for College Students in Texas, Fiscal Year 2003*, last updated in July 2004.

Top Ten Percent

The automatic admission program for students who graduate in the top ten percent of their high school classes allows those students to enroll at the university of their choice. As a result of automatic admissions, those students now dominate the freshman classes at both major research universities in the state, Texas A&M University (TAMU) at College Station and The University of Texas (UT) at Austin. Those universities state that they no longer are able to admit many highly qualified students on a competitive basis due to the ten-percent rule. Some have proposed excluding TAMU and UT-Austin from the institutions that must provide automatic admissions to the top ten percent of graduating high school seniors or limiting those admissions to a percentage of the freshman class.

The 79th Legislature may consider modifying the automatic admission program.

Community Colleges

The state's 50 community colleges (CCs) absorbed 72 percent of the state's 41,000 new college students in 2004. Under the Texas Higher Education Coordinating Board's (THECB) 2000 higher education plan, *Closing the Gaps*, CCs are projected to enroll most of the additional 500,000 new students expected by 2015. The latest progress report reveals that the state is ahead of the THECB target for the 2005 enrollment goals, except for Hispanic students. The latest census information indicates that the Hispanic population is growing at a faster rate than was forecast in 2000.

In the current biennium, CC enrollment grew by 14.7 percent and nearly tripled the enrollment in each of the two previous biennia. More than 1.1 million residents enrolled in CC programs in the 2002-2003 academic year. CCs provide much of the workforce education in Texas, enrolling nearly 500,000 students in technical credit courses. Another 500,000 students enroll in academic credit courses. The legislature also has expanded the role of community colleges in educating teachers and registered nurses.

The legislature may consider expanding the role of the CCs in other career fields where shortages exists.

The linkage between public education and higher education has become increasingly important over the last decade. CCs can provide a bridge for those high school graduates who are not prepared for university-level courses. Identifying and implementing effective programs for developmental coursework has become a high priority role for CCs.

Over the last two decades, state funding for CCs declined from 60 percent of CC revenue in 1984 to 31 percent in 2003. In the last 10 years, CC property taxes have increased 86.9 percent, and tuition and fees have increased 73.7 percent.

CCs receive state funding through a formula that is based on contact hours. THECB determines the cost of instruction and administration per contact hour; the legislature funds a percentage of that cost. In the 2002-2003 biennium, the legislature appropriated \$6.43 per contact hour, the same amount as in 1994-1995 but down from \$7.71 in 2002-2003. The Texas Association of Community Colleges states that an increase of \$357.9 million is necessary to return state funding to the level provided by the 77th Legislature, a 14 percent increase over the level provided by the 78th Legislature.

Each CC has a tax district and a service area. Originally, the property tax supported facilities and maintenance, and state funding paid for instruction. The tax district is limited to areas in which voters have approved a tax initiative. The service area may be larger than the tax district, and its residents pay higher tuition than in-district students. In some service areas, tax authorization elections face opposition, and one-third of the total

state property value is outside CC taxing districts. The 79th Legislature may consider aligning taxing districts with service areas.

To accommodate both the growth in enrollment and the reduction in state funding, CCs have increased the minimum average class size from 10 to 15 students, eliminated low enrollment programs, reduced equipment purchases and deferred maintenance, delayed the start of new programs, eliminated athletic teams, increased distant learning opportunities, increased tuition and tax revenue to offset loss of revenue, and increased faculty workloads.

THECB has developed an accountability system for CCs as directed by Governor Perry in January, 2004, and in cooperation with institutions of higher education (IHEs). The system will measure the effectiveness and quality of education at each IHE. THECB has grouped similar institutions, and their performance will be evaluated based on participation, success, excellence, research, and institutional effectiveness and efficiencies.

The legislature may consider increasing CC enrollment capacity, expanding taxing jurisdictions, increasing credit-hour funding, or increasing the state share of funding.



JURISPRUDENCE

Courts

Texas, as a general proposition, has two courts where most states have one, often with concurrent jurisdiction on many levels (for example, Texas has two high courts, the Texas Supreme Court and the Texas Court of Criminal Appeals; at the trial level, it has the district courts and the county courts). There also may be overlap at some levels between districts. This can make it difficult for citizens to determine which is the proper court in which to file an action and makes it difficult to judge the work levels of the courts and determine where resources are needed. There has been no redistricting on the district court level for over a century, which has contributed to the problem. Judicial districts and statutory county courts at law have been created by the legislature in a patchwork response to local concerns. Statutory county courts at law also present a problem because the jurisdiction of such courts can vary radically from court to court.

The legislature may consider remedies including eliminating the civil county courts at law, eliminating concurrent jurisdiction between the county courts at law and the district courts, expanding the district courts, or making jurisdiction uniform among the county courts at law. Funding to support such changes would also be an issue.

Judiciary

Members of the judiciary, such as Supreme Court Justice Scott Brister, have testified that Texas has difficulty retaining good judges, with many leaving the system to go into the more lucrative private sector. Also, the way the judicial system is structured, some lower court judges receive higher salaries than the state's supreme court justices. Due to uneven caseloads, many trial court judges are overworked, and the lack of funding for adequate support staff exacerbates the caseload problems. The legislature may consider ways to attract and retain good judicial candidates, such as higher salaries, retention bonuses, or improved retirement benefits.

Guilty by Reason of Insanity Plea

Several recent news stories have highlighted the issue of persons who have been found not guilty by reason of insanity, were committed for treatment, released, and then committed another violent crime. Advocates for the mentally ill assert that these stories are just aberrations and urge caution in considering changes to the law, although all parties agree that the system for treating the mentally ill is inadequate.

The legislature may consider adopting a conditional release program which provides that a person who does not comply with the outpatient treatment plan on release will be

returned to inpatient treatment. Funding needed to create an infrastructure to monitor persons once they are released from a state hospital to ensure they are continuing treatment, and ensuring that any such system would pass constitutional muster are issues that the legislature will likely have to address.

Asbestos

Asbestos was once widely used in the United States for construction and insulation. Breathing in microscopic amounts of asbestos fibers can result in cancer and debilitating illness, but it may take decades before the damage becomes evident. In the 1970s, the implications of workplace exposure to asbestos became apparent as injured and dying workers began to file claims. There are now claims for billions of dollars filed by hundreds of thousands of persons who were exposed to asbestos. These actions often claim that asbestos manufacturers knew early on of the risk of workplace exposure to asbestos, but concealed the evidence and failed to take steps to protect those working with or around asbestos. In 2002, one study estimated that more than 600,000 asbestos claims and lawsuits had been filed. As asbestos manufacturers began filing for bankruptcy in the face of mounting claims and awards, claimants expanded their actions to include others in the distribution chain, such as distributors, installers, and successor corporations.

One issue is the filing of claims by those who have been exposed to asbestos, but do not have any current health problems. Plaintiffs' attorneys argue that these plaintiffs have suffered a tort injury and may in the future develop the deadly and debilitating illnesses associated with exposure; also, filing such claims may be necessary to protect claimants from losing their right to sue pursuant to the statute of limitations. Opponents claim that aggressive plaintiffs attorneys are "beating the bushes" for claimants and that 50 to 90 percent of claimants have little or no impairment as a result of exposure. They assert that such allegedly frivolous actions have resulted in expensive and complex litigation that potentially involves dozens of defendants, drives companies out of business, hurts the economy, and results in lower awards for those claimants who are truly suffering from the effects of exposure.

The 78th Legislature, Regular Session, enacted legislation limiting the liability of certain successor corporations for the asbestos-related liabilities of a corporation acquired through merger or consolidations. Legislation was introduced, but not enacted, that would have: established medical criteria for determining whether a claimant in an asbestos exposure claim was suffering from actual impairment; placed claims where there was no actual impairment in an inactive docket, but waived the statute of limitations for such claims; set forth a procedure for transferring claims from the inactive docket if the claimant developed impairment; and given trial preference to claims involving malignant conditions resulting from asbestos exposure. Similar proposals may be introduced in the 79th Legislature.

Congress is also considering imposing limitations on the filing of asbestos claims and creating a trust fund to compensate asbestos exposure victims, but those supporting action by the Texas legislature argue that it is urgent for the state to address this issue, regardless of what congress does. Opponents assert that such legislative proposals are being promoted by business interests and do not adequately protect the rights of injured plaintiffs.

Same-sex Marriage

Texas law already clearly provides that a valid marriage may exist only between a man and a woman. The Texas Family Code not only specifically refers to a man and woman in regards to marriage licenses, but also expressly provides that a marriage license may not be issued to persons of the same sex. Also, under the federal Defense of Marriage Act, states have the right to refuse to recognize same-sex marriages performed in other states.

However, following a 2003 decision by the Massachusetts Supreme Judicial Court that same-sex couples were allowed to marry under that state's constitution, 13 states amended their constitutions by defining marriage as between a man and a woman and barring same-sex marriages. Some of these amendments went farther, prohibiting civil unions or other systems that would grant same-sex couples a similar status to marriage. Opponents expressed concern that some of these more expansive amendments could have far-reaching and unintended effects, such as prohibiting state entities, such as universities, or even private businesses, from offering health and other benefits to same-sex couples.

The Texas Constitution has no provision defining marriage, and the legislature could consider introducing such an amendment. However, a too far-reaching constitutional amendment could potentially violate the equal protection provisions of the United State Constitution. In 1996, in *Romer v. Evans*, the United States Supreme Court held that an amendment to the Colorado Constitution prohibiting the state from enacting or enforcing laws or regulations that entitled homosexual or bisexual persons to claim minority or protected status, quota preferences, or discrimination violated the United States Constitution. Although Colorado argued that the state amendment only denied homosexual persons special privileges, the supreme court held that the amendment's sweeping language could be interpreted as depriving homosexual persons of the protection of general laws and policies prohibiting arbitrary discrimination in public and private settings. The court ruled that the amendment, by making it more difficult for one class of citizens to seek assistance from the government, violated the constitutional guarantee of equal protection.

The 79th Legislature may consider issues relating to same-sex marriage.



WORKERS' COMPENSATION

Studies show that Texas has among the highest workers' compensation cost per claim and utilization rates in the nation, but one of the lowest return-to-work rates for injured workers. All parties to the workers' compensation system—workers, health care providers, and employers—agree that the system is in crisis. Health care providers complain about cumbersome administrative burdens, low reimbursement rates, and problems with preauthorization, because a physician may treat an injured worker, only later to have the medical necessity of the treatment challenged. Workers complain about a confusing system and an inability to obtain the medical help they need. Employers argue that the system is too costly and that there is overutilization and fraud. Although all parties agree there is a problem, there is no consensus regarding solutions.

The legislature may consider ways to limit fraud and overutilization in the workers' compensation system, such as implementing some form of a network system, in which injured employees would be directed to a network of preselected care providers. It may also look at the method by which the reimbursement rates are set and the procedures regarding authorization of treatment.

Statutory Employees

Under Texas law, the exclusive remedy available to an employee injured on the job whose employer subscribes to the state's workers' compensation system is the recovery of workers' compensation benefits. Under Section 406.123 (Election to Provide Coverage; Administrative Violation) of the Texas Labor Code, a general contractor and a subcontractor may agree that the general contractor will provide workers' compensation insurance coverage to the subcontractor and the subcontractor's employees. Such an agreement makes the general contractor the employer of the subcontractor and its employees for purposes of the state's workers' compensation laws. The subcontractor and its employees in effect become the statutory employees of the general contractor.

Often a subcontractor will contract out work to other subcontractors. A question has arisen over whether the statutory employee protection granted by Section 406.123 to the contractor applies to all the lower tiers of subcontractors who were not part of the original agreement. In January 2004, a Texas appellate court ruled in *Etie v. Walsh and Albert Company, Ltd., et al.*, 135 SW3d 764 (Tex. Ct. App. 2004), that the statutory employer/employee relationship extends throughout all tiers of subcontractors; therefore, all the employees of the contractor and its subcontractors are covered by the workers' compensation system, and the contractor and all the subcontractors are equally immune from suit by an injured employee. The legislature may review this issue and consider clarifying the extent of the protection offered by Section 406.123.



INTERGOVERNMENTAL RELATIONS

Urban, Exurban, and Rural Areas of Texas

S.B. 264, 78th Legislature, Regular Session, required the Senate Intergovernmental Relations Committee and the House Urban Affairs Committee to jointly investigate whether subdividing uniform state service regions into urban/exurban areas and rural areas would impact the provision of state and federal financial assistance to meet the housing needs of rural areas in Texas. It also required the committees' findings to include a proposed definition for "exurban areas" and an assessment of the housing needs of exurban areas and recommended solutions to address those needs.

Edwina Carrington, executive director of the Texas Department of Housing and Community Affairs (TDHCA), has stated that an agreed upon definition of exurban does not exist within the planning community and that TDHCA does not have sufficient data substantiating the need to have an urban/exurban region or the fiscal impact of further subdividing the current regions. Consequently, TDHCA defined exurban as an incorporated city that is not a rural area and has a population no greater than 100,000 based on the most current information published by the United States Census Bureau as of October 1 of each preceding application year.

The 79th Legislature may consider legislation to clarify the definition of exurban.

The legislature may also direct TDHCA to conduct a needs-assessment study regarding the establishment of an urban-exurban region for the purpose of allocating housing funds.

County Clerk Filing Fees

Currently, Section 51.605 (Continuing Education), Government Code, requires county clerks to complete 20 hours of continuing education courses, including one hour dedicated to fraudulent court documents. The committee found that there is a need for county clerks to have a better working knowledge of the formula used by the Texas Building and Procurement Commission (TBPC) to calculate charges for formatted data.

The legislature may consider a mandatory training requirement for all county clerks to be provided by the Open Records Section, TBPC, on assessing charges for copies of public information (within the mandates of Chapter 552, Government Code).

Rural Economic Development

The Office of Rural Community Affairs (ORCA) was created to facilitate the state's economic and community development and health programs targeting rural communities in Texas.

ORCA was formed by consolidating existing rural-focused programs and services from various state agencies under the single administrative umbrella of the new agency, and charged with providing a sustained and comprehensive focus on rural issues, needs, and concerns.

There are additional responsibilities that could assist ORCA in promoting greater opportunities for economic growth in rural areas, such as:

- Currently, ORCA is not required to help businesses in rural communities. Businesses considering relocating or expanding into rural areas may need assistance and guidance to succeed and revising ORCA's mission to this affect could complement rural economic development and business expansion.
- Currently, there is no clearinghouse of information detailing resources available to rural communities. ORCA, the agency dedicated solely to serving rural Texas, would be the likely entity to develop a comprehensive guide detailing available state and federal resources dedicated to rural communities.
- In addition, ORCA has some discretion allocating Community Development Block Grants and may use those funds to address the rehabilitation of older homes in rural areas.

The increasing number of non-border colonias affects the progress of rural economic development in the state. The legislature will likely consider legislation requiring an assessment of the number and conditions of non-border colonias and a report submitting those findings to the legislature.

Area Health Education Centers (AHECs) have developed an extensive network to address the state's critical need for rural workforce development. The states' three current AHECs have the opportunity to increase access to health care education, provider recruitment, professional support, and community coordination.

A methodology is needed for recruiting physicians and other needed health care practitioners for basic health care services in rural communities and for determining specific areas where shortages are continually prevalent. Additionally, health care is an important consideration for workforce development boards to ensure the viability of rural communities.

Currently, the 4A/4B Economic Sales Tax cannot be applied toward health care services. Health care is a critical part of the viability of local rural economies. The legislature may consider recommendations from rural stakeholders for promoting economic growth in rural areas of Texas, including legislation to clarify and expand the allowable uses of 4A/4B economic development sales tax revenues to include health care services.

The ability to properly research and develop grant proposals is not immediately available to rural communities. The legislature may consider establishing a grant database that would allow increased access to the necessary information to complete a grant application, increasing access to the grant process for local communities and improving their ability to compete for federal, state, and foundation funding.

Currently, data submitted to the Department of State Health Services regarding health status and access to care does not define rural and urban differences. Distinguishing the differences could better serve to identify rural health care needs and expand rural communities' access to federal assistance programs.

The legislature may also consider legislation to require the governor's state grant writing team, in conjunction with ORCA, to assist rural communities with grant writing, model grant applications, and basic grant writing instruction.

In order to bring attention and support to rural issues and more effective relationships with local elected officials, the legislature may examine whether state agencies are coordinating with local councils of governments to further regional cooperation and funding for rural areas.

The legislature may also examine additional ways to increase health care options for rural Texas, such as increasing the appropriations to the state's Area Health Education Centers and amending the Health and Safety Code to require the Department of State Health Services to research and report on the current and potential use of non-physician health care practitioners in medically underserved areas and health professional shortage areas.

Texas Wine Producing Industry

Twenty years ago, Texas had approximately 12 wineries and 2,500 acres of planted grapes. Today, Texas is the fifth-largest wine producing state. Sixty wineries are in production, with 80 permits pending. The wine industry is a value-added industry because everything is done in Texas, and it is estimated that the industry currently creates \$200 million in revenue for the state.

Since September 2003, with the passage of a state constitutional amendment, the number of Texas wineries has doubled and the areas served by wineries have expanded. The constitutional amendment authorized the legislature to adopt laws and the Texas

Alcoholic Beverage Commission (TABC) to adopt policies applicable to all wineries in Texas, regardless of whether the winery is located in an area where wine sales have been authorized by local option election, thereby encouraging the development of wineries in "dry" areas. Wineries are now located in every region of Texas.

The legislature may consider several issues to assist the Texas wine industry, including:

- Establishing of a comprehensive enology (the study of wines) program to train and educate future Texas winemakers, e.g., a university degree program in viticulture and enology, to ensure that Texas has sufficient Texas trained wine specialists who will more than likely remain in Texas to work.
- Addressing the need to increase state and federal funding for the science of winemaking and research and development, particularly regarding Pierce's Disease, a potentially devastating disease that attacks grapevines and can lead to the decimation of entire vineyards and wine regions.
- Continuing support for the Texas Department of Agriculture's Wine Making Assistance Program, enacted by the 77th Legislature in 2001.
- Continuing to look for ways to promote national and international awareness of Texas wines through festivals and agri-tourism and create a "Brand Texas" image.
- Authorizing wineries to have more than four events per year, eliminate the tasting room sales cap and expanding tasting room hours in order to optimize the economic benefits of the attractions of Texas wineries.
- Authorizing every Texas winery to post a sign directing visitors to the winery, thus increasing sales and visitors to the wineries.



NATURAL RESOURCES

Air

The Federal Clean Air Act (FCAA) defines a nonattainment area as any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the primary or secondary National Ambient Air Quality Standard (NAAQS) for one or more of the six criteria pollutants.

In 1997, the Environmental Protection Agency (EPA) adopted a new, stricter NAAQS for ground-level ozone, noting that the one-hour standard "was inadequate for protecting public health." The new standard is referred to as the eight-hour ozone standard, as it changes the averaging period of the ozone standard from one to eight hours, but lowers the amount of ozone that can be detected in an area. After several years of litigation, the United States Supreme Court gave EPA the authority to implement the more protective eight-hour ozone standard, and EPA designated eight-hour nonattainment areas in April, 2004.

EPA proposed rules for the eight-hour plan in the spring of 2003, requiring states to designate each county within the state as unclassifiable, attainment, or nonattainment by July 15, 2003. Unclassifiable areas cannot be classified on the basis of available information; attainment areas meet the primary or secondary standard; and nonattainment areas do not meet the national primary or secondary standard, or contribute to ambient air quality in nearby areas that do not meet the national primary or secondary standard.

Texas has four one-hour nonattainment areas (Houston/Galveston, Beaumont/Port Arthur, El Paso, and Dallas/Fort Worth), incorporating 16 counties. State officials have recommended that Houston/Galveston, Beaumont/Port Arthur, and Dallas/Fort Worth be designated nonattainment under the eight-hour ozone standard, along with San Antonio.

Three areas of the state have entered into Early Action Compacts for early compliance with the eight-hour ozone standard: Austin/San Marcos, Longview/Marshall, and San Antonio, incorporating 13 counties. The compacts require participating localities to comply with the eight-hour standard by the end of 2007.

The 79th Legislature will likely continue efforts to comply with the federal air quality standards established by the FCAA with special focus on non-attainment and near non-attainment areas.

In 2001, the 77th Texas Legislature passed the Texas Emission Reduction Plan (TERP), one of the nation's most aggressive pollution reduction incentive programs. TERP is a

comprehensive set of incentive programs aimed at improving air quality in Texas. The Texas Commission on Environmental Quality administers TERP grants and other financial TERP incentives. TERP is slated to expire in 2007.

The 79th Legislature may consider funding and extending TERP to 2010 or 2013 in order for the state to receive credit for the state implementation plan for achieving new air quality standards.

The Texas Environmental Research Consortium (TERC) has sponsored air research projects involving the improvement of emissions inventory from both industrial and mobile sources, air quality modeling, and policy guidance. The 79th Legislature may investigate and consider various funding methods for TERC research projects that include the review of meteorology, volatile organic compounds from industrial sources, and nitrogen oxide emissions from various sources.

Water

With the population of Texas expected to double by 2050, the major urban areas will be pressed to both conserve water and seek new sources of water to meet growing demands. The rural areas of the state are being targeted for water marketing and exportation to urban areas.

Proponents of water marketing claim that the state must increase the yield of existing reservoirs, utilize unused water sources, and transport the water where it is most needed. These groups also promote the mobilization of private resources to meet water needs.

Opponents to water marketing and exportation believe that large-scale withdrawals of groundwater for export could adversely affect rural communities, farming and ranching operations, and the environment.

The General Land Office currently has the statutory authority to lease state water rights and is considering proposals to lease permanent school funds and permanent university lands and their water rights for developing and marketing water. The 79th Legislature may review funding alternatives for research in this area and may consider legislation requiring that contracts for the lease of state water rights be consistent, subject to open bidding, and in compliance with the state water plan.

Currently, the state, with oversight by the Texas Commission on Environmental Quality (TCEQ), has jurisdiction over all surface water in the state, but groundwater management is regulated on a region-by-region basis by regional or local groundwater districts as defined in Chapter 36 of the Texas Water Code. These districts are authorized to establish their own regulations and restrictions and interpretation of the "rule of capture" and "junior and senior water rights."

The 79th Legislature may consider legislation providing oversight and more consistent guidelines for the local groundwater districts to set pumping caps based on sound science and oversight for groundwater districts' boards of directors.

Rule of Capture

The rule of capture which allows landowners to pump as much water beneath their land as they want without regard for the impact on their neighbors' supply was established in Texas in 1904 and still prevails. The 79th Legislature may re-evaluate whether the rule of capture is the appropriate policy for all areas of the state, with special consideration given to West Texas.

Junior Water Rights

Junior water rights are granted subsequent in time to other water rights in the same basin. These rights are "junior" in time priority to all such rights that were previously granted or recognized by the state. No part of the junior water rights can be impounded, diverted, or beneficially used and recognized until the senior right is satisfied in its entirety. The legislature may consider legislation clarifying and creating more consistent water rights across the state.

Interbasin Transfers

Interbasin transfers (IBTs) are movement of surface water from one basin to another, subject to approval and regulation in Texas by the Texas Commission on Environmental Quality. The 79th Legislature may review updated scientific research on the effects of IBTs on the various aquifers across the state and consider more restrictive legislation.

Desalination

Already a major participant with over 100 plants that treat brackish surface or groundwater, the state of Texas is looking at desalination as an alternative solution for the future water supply needs.

The 79th Legislature may consider legislation to extend desalination projects to include large-scale seawater projects and some form of public-private partnership. The Texas Water Development Board has selected three industry proposals for Freeport, Corpus Christi, and Brownsville for further consideration.

The 79th Legislative may also consider the cost of desalination and environmental issues and costs associated with the disposal of the briny byproduct of the desalination process.

Environmental Flow Protection

Along with the increasing demand associated with municipal, industrial, and agricultural water supplies, are the environmental demands of instream flows or bays and estuaries. These considerations include the use and non-use of water supplies that would ensure the continued flow of water in Texas rivers, bays, and estuaries that are essential to Texas fishing, gaming, and tourism industries.

The 79th Legislature may consider aspects of how other western states have addressed the management of environmental flows, usually through some form of reservation from appropriation to non-state agencies. Legislative focus could include strategies to clarify what quantity of flow is needed in each stream segment and bay and estuary system and how legislation might best manage and protect these flows in the future.

Watermaster Programs

Watermasters are officials who ensure compliance with water rights by monitoring stream flows, reservoir levels, and water use. Watermasters also coordinate diversions in the basins which are managed by watermaster programs. A water right holder must notify the watermaster and indicate the amount of water to be diverted so that the watermaster can ensure that the water supply is adequate to meet the needs of all diverters along a stream.

Watermasters protect water rights by stopping illegal diversions, provide real-time monitoring of area streamflows, mediate conflicts and disputes among water users, and provide technical assistance to water users.

Texas has two watermasters: the South Texas Watermaster and the Rio Grande Watermaster. By law, the costs associated with watermaster programs are paid by the water right holders.

Under the Texas Water Code, Section 11.325 (Water Divisions), water divisions may be created as the need arises. The role of the divisions is to provide protection to the holders of water rights and economical supervision to the state. The executive director of the Texas Commission on Environmental Quality (TCEQ) may appoint a watermaster to an established water division. TCEQ may also authorize the executive director to appoint a watermaster upon receipt of a petition of 25 or more holders of water rights in a river basin or segment of a river basin. This requires a hearing before TCEQ where persons may present testimony and evidence either in support of or against the petition.

In the Rio Grande basin, above Amistad, water rights are managed as a "first in time, first in right" stream as they are in other parts of Texas. Water rights in the Middle and Lower Rio Grande are served by the Falcon-Amistad system. Water below Amistad is allocated

on an account basis. Priority is given to all municipal accounts; at the beginning of each year, each municipal account's storage balance is set to the authorized water right amount. The municipal priority is guaranteed by the monthly reestablishment of a municipal reserve in the system of 225,000 acre-feet.

Irrigation accounts are not reset each year and must rely on carry-forward balances. Each month, a determination is made as to how much unallocated water assigned to the United States is within the Falcon-Amistad system. If surplus water is identified, the water is allocated to irrigation accounts on a monthly basis. When water is used, it is subtracted from the respective account by type of use from the accounts usable balance. This system of accounting for water usage was put in place after an international treaty with Mexico was established and adjudicated by a district court ruling in 1969.

The South Texas Watermaster program is responsible for an area that encompasses 50 counties in south central Texas. Five field deputies patrol these counties from offices located near their jurisdictional areas of responsibilities.

Along with the other water policy issues facing the 79th Legislature, legislators may review the need for establishing additional watermaster programs to ensure and enforce compliance with water rights in other parts of the state.

Coastal Erosion

The Coastal Erosion Planning and Response Act (CEPRA) was enacted in 1999 to preserve, restore, and protect the Texas coastline. In 2003, CEPRA reported that 229 miles of the 367-mile Texas gulf shoreline is in critical erosion condition and that substantial portions of the state's 3,300 miles of bay shoreline are eroding. The 79th Legislature may consider ways to sufficiently fund CEPRA and contract with federal partners on long-term coastal erosion projects.

Rock Quarries

Texas is home to more than 300 rock quarries, a number that include granite, limestone, sandstone, and asphalt quarries and rock crushing operations across the state. A survey conducted by the Texas Commission on Environmental Quality (TCEQ) in May and June, 2004, indicated that only 140 of the 272 quarries that are required to have air and/or water pollution permits actually have permits. TCEQ reported that some permitted quarries were operating in violation of their pollution permits and others are without permits to operate as quarries or rock-crushing facilities.

Environmentalists are concerned about the impact to rivers and streams with sediment from quarries blocking environmental flows, and landowners and residents living near quarries have expressed concerns about increased truck traffic, potential air and water

pollution, and unsatisfactory land reclamation resulting from unlicensed and under-regulated quarries.

In May, 2003, Governor Perry, by executive order, created a joint study committee to advise TCEQ on issues related to the regulation and permitting of rock crushers and quarries. The 79th Legislature may consider legislation to address air quality monitoring, regulations for blasting operations, and weaknesses in the permitting process and enforcement.

Landfills

Existing landfills are expanding (mostly upward), and such expansion is not always addressed or allowed by the existing permit. As TCEQ considers rule changes on permitting and enforcement, the 79th Legislature may discuss restrictions and changes to the permitting process for existing landfills.

There is another emerging issue with transfer stations. These are located in the city, where local garbage collection vehicles transfer their loads to larger transport vehicles for longer hauls to landfills located farther away from municipalities. There are some benefits to this kind of two stage transport, but there is also some concern about having them in the neighborhoods. The legislature may review further restrictions regarding transfer stations.

Renewable Energy Development

Renewable energy sources, such as wind, sun, and water, are a small but growing segment of the power market.

Wind is an ancient power source being rediscovered in Texas; the Lower Colorado River Authority, Texas Utilities, and the City of Austin Electric Utility are among the entities acquiring a part of their power needs from wind plants or wind farms, as they are known.

The Panhandle, mountainous parts of West Texas, and perhaps the lower Gulf Coast, contain areas with winds suitable for electric power generation. Current technology could allow the production of as much as 23 percent of Texas' current electric needs, while improving wind turbine technology and decreasing development costs will greatly expand the number of commercially attractive sites.

Solar power is another renewable energy resource gaining increasing attention. Solar radiation is available throughout the state in sufficient quantity to power distributed solar systems such as solar water heaters and off-grid photovoltaic panels. Large solar power plants will be most cost-effective, though, when sited in areas of West Texas that receive very high levels of direct solar radiation. Advocates believe that solar energy

development can become a major contributor to satisfying the future energy needs of Texas.

Water energy resources include hydroelectric power from lakes and rivers, ocean energy in its various forms, and energy technologies that take advantage of saline water; Texas possesses these resources in varying degrees.

Hydroelectric power, or hydropower, makes use of the kinetic energy water gains when it drops in elevation. Typically, water dammed in a lake or reservoir is released through turbines and generators to produce electricity. Hydropower has been a staple of electricity generation since the beginning of the electric age, peaking at about 40 percent of the national electrical energy mix in the 1930s to about 10 percent today. In Texas, hydropower accounts for only one percent of the state's electrical generating capacity and less than 0.5 percent of the energy produced.

Saline and brackish water are common throughout much of Texas, and several technologies can take advantage of saline water for energy production, including solar ponds and algae production. Solar ponds use the salt water in such a manner that heat from sunlight is effectively locked in the pool and can be used for a number of process heat applications or electricity production. The ability of the pond to store solar thermal energy is unique and overcomes the resource variability, a drawback of traditional solar development. Salt water algae grow prolifically under cultivated conditions and can be pressed to extract biodiesel feedstocks or dried and burned for power production.

The legislature may consider proposals to encourage the development of renewable energy resources.



AGRICULTURE

According to the Texas Animal Health Commission (TAHC), Texas and Wyoming are the only two states that are not bovine brucellosis free. Although the disease is not rampant in Texas, the state must be detection free of the disease for 12 months to be declared brucellosis free.

Texas, California, New Mexico, and Michigan are the only four states that have not been declared tuberculosis free, and TAHC is focusing on new and improved rules and national standards to attain disease-free status.

Swine brucellosis and pseudorabies are being reintroduced into the domestic swine population by feral swine, and TAHC is conducting routine surveillance for these diseases and isolating feral swine prior to slaughter. TAHC reports that feral swine are a potential source for other serious diseases as well.

With renewed focus on the threat of intentional and accidental introduction of diseases, the 79th Legislature may continue to review and monitor TAHC's preparedness to address emergency situations and efforts in early detection, exclusion, and treatment of diseased plants and animals.

The legislature may also consider ways to work with the biological control industry in developing a systemic plan for the eradication of fire ants and with the Texas Department of Agriculture in continued efforts to control the feral hog population.

Finally, the 79th Legislature may also consider:

- legislation directed at helping farmers and ranchers with diversification initiatives that include ethanol production;
- further initiatives to aid the Texas wine industry and provide educational resources for new growers;
- initiatives such as tax credits and funding methods for continued research into biobased products and the use of biowastes in producing biobased food products and biofuels for high-efficiency engines; and
- initiatives that explore new technologies and business opportunities and enhance and develop agricultural industries such as the shrimp and oyster industries within the state.



VETERANS AFFAIRS and MILITARY INSTALLATIONS

The Hazlewood Act

The Hazlewood Act (Section 54.203, Education Code) (Hazlewood), entitles wartime veterans and their children to a waiver of tuition and fees at some state-supported colleges and universities. There has been much discussion concerning whether veterans who have not fully used their entitlement under the Act should be allowed to pass on residual benefits to their children. Concerns have been raised by some regarding how such a benefit legacy program would be administered and the cost implications of the program.

The legislature may consider establishing a data collection and management system to provide information that could serve as the basis for future expansions of the exemption.

The legislature may examine issues relating to the cost impact of Hazlewood on institutions of higher education, and possible alternative sources of revenue including creation of a specialized license plate, with proceeds to benefit the participating colleges, or an adjustment to the higher education formula funding that would count a Hazlewood recipient as two students for funding purposes.

The legislature may also consider granting rulemaking authority to the Texas Higher Education Coordinating Board, the Texas Veterans Commission, or some other governmental entity to allow more flexibility in administering Hazlewood benefits.

State Reciprocity Agreements for Military Personnel

H.B. 591 was enacted by the 78th Texas Legislature, Regular Session, to address the educational disruptions often experienced by dependents of military personnel due to frequent moves. Disruptions can include difficulty in transferring records and credits and taking repetitive evaluation tests. Prior to the passage of H.B. 591, the Texas Education Agency (TEA) was authorized, but not required, to negotiate reciprocity agreements governing the terms of school transfers with other states. H.B. 591 required TEA to:

- pursue reciprocity agreements governing the terms of transfers with other states;
- prioritize seeking reciprocity agreements with Florida, Georgia, North Carolina, and Virginia;
- allow a student to fulfill exit-level requirements through comparable instruments administered in other states; and
- report the results of these efforts to the legislature by January 1, 2004.

Concerns have arisen that the reciprocity agreements have not fully resolved the issues of delayed transfer of records, misinterpretation of school records leading to inappropriate class placement, and problems associated with exit-level testing.

The legislature may direct TEA to take immediate action to establish reciprocity agreements pursuant to H.B. 591 and may also require TEA to pursue reciprocity agreements with Louisiana, Maryland, New York, and South Carolina.

The legislature may consider amending Section 25.002, Education Code, to require a school district sending records to another district to send the records not later than the 15th day after the date the child is enrolled. In addition, legislation may be considered to provide that parents should be notified that they may request and receive an official copy of their children's records to hand carry to the new school. The legislature may consider applying those provisions to all mobile students and not only to military-connected students.

The legislature may also consider alternatives to the Texas exit-level assessments for recent transfers from other states, e.g., advanced placement exams, international baccalaureate exams, ACT, or SAT II.

Base Realignment and Closure (BRAC)

Efforts during the 78th Legislature that culminated in S.B. 652 (relating to economic development, strategic planning, and other issues regarding military facilities, and the merger of certain state agencies with military responsibilities; granting authority to issue bonds), S.B. 1295 (relating to providing financial assistance to defense communities), and S.J.R. 55 (proposing a constitutional amendment authorizing the issuance of general obligation bonds or notes to provide loans to defense-related communities for economic development projects, including projects that enhance military value of military installations), as well as continued efforts by state and local leaders, position the state for the 2005 round of base realignment and closure.

The newly created Texas Military Preparedness Commission (TMPC) has instituted projects and programs to help increase military value of Texas' defense communities, and also to handle the consequences of an installation being realigned or closed. Through the leadership of the TMPC, defense-connected communities have become more involved with the military, and community/military partnerships have been fostered throughout the state.

The legislature may continue to address BRAC issues as the 2005 decisions are announced. Among these issues are broadening the Defense Economic Adjustment Assistance Grant's (DEEAG) language to attract new missions and addressing redevelopment needs.

4A/4B Tax Changes and Military Installations

4A and 4B sales taxes are the common terms for local taxes imposed under sections 4A and 4B of the state Industrial Development Corporation Act (Article 5190.6, Vernon's Texas Civil Statutes) and have been used in a variety of ways by communities to raise funds for development projects. H.B. 2912, enacted during the 78th Legislature, Regular Session, narrowed the definition of economic development, limiting the use of 4A/4B taxes for infrastructure development around military bases.

Texas' military bases face ongoing reassessment by the federal government. State leaders, defense communities, and military leaders feel that they need maximum support to highlight and enhance Texas' military value, thus reducing the risk of base closure. Prior to the passage of H.B. 2912, communities used the 4A/4B tax revenues to offset economic losses and transition costs upon a local base closure.

The legislature may consider amendments to the Industrial Development Corporation Act to allow use of the 4A/4B tax revenue to strengthen defense community infrastructure. In particular, the legislature may consider expanding the statutory use for 4A/4B revenue to include activities and expenses associated with every stage of the base realignment and closure process, from enhancing new missions, to preparing for added military personnel, to assisting a defense community after closure.

Support for Service Members and Families

The current conflicts in Iraq and Afghanistan have created new problems for Texas service members, their families, and their employers. As of September 2004, approximately 5,500 Air and Army guardsmen have been deployed to Iraq, Afghanistan, Kosovo, and Bosnia. Additionally, approximately 4,500 Texas reservists are currently deployed overseas. These deployments are causing hardships because of their unpredictable length and frequency.

H.B. 261, 78th Legislature, Regular Session, allows members of the armed forces or dependents to pay state college tuition rates, as long as the student is continually enrolled in the same degree or certification program. The 79th Legislature may examine other ways to increase the level of support for families and service members such as allowing appropriate agencies to accommodate reciprocal licenses and certifications of military spouses transferred to Texas.

Fire and Police Promotional Examinations

The Texas Committee on Employer Support of the Guard and Reserve (TXESGR) has reported a conflict between the federal Uniformed Services Employment and

Reemployment Rights Act (USERRA) and state regulations concerning fire and police promotional exams for deployed guard and reserve members.

Police and fire personnel are promoted through exams given every one to two years. Municipalities usually give promotion exams in accordance with Chapter 143 (Municipal Civil Service), Texas Municipal Code, which specifically limits police officers and firefighters on active military duty from taking an examination, and further limits access until 90 days following their return from active duty. The rationale is that the 90-day period is considered necessary to bring the person up to date on equipment and techniques.

Section 4216 of Title 38 (USERRA), United States Code, entitles a returning service member to the seniority and other rights and benefits determined by seniority that the person had at the time the person left for duty, plus the additional seniority and rights and benefits the person would have obtained had the person remained continuously employed.

The legislature may consider changes to state law to allow promotional exams to be sent to military proctors so that reservists can take the examinations while on active duty.

Payday Loans

A "payday loan" or "deferred deposit loan" is a transaction in which credit (a loan) is extended by a payday lender, for a specified period, in exchange for either:

- a) a check from the borrower for the amount of credit extended, plus a fee and any interest accrued, which by mutual agreement between the parties will not be cashed by the lender until a specified later date; or
- b) authorization from the borrower for the payday lender to electronically debit the borrower's account at the end of the specified period for the amount of the credit extended, plus a fee and any interest accrued.

A "sale-leaseback transaction" is a payday loan that requires one or more serial numbers of the borrower's major appliances that the lender "purchases" with the loan. Appliances are then "leased back" to the borrower at interest rates higher than would be allowed under a traditional payday loan. S.B. 317, 77th Legislature, defined these sale-leaseback transactions as payday loans, making them subject to Texas law regarding payday loans.

The legislature will likely continue to monitor the issue of payday loans with respect to their frequency around military installations. The legislature may also consider recommendations from the Texas Office of Consumer Credit Commissioner regarding

payday loans, including recommendations to make counseling mandatory before making a payday loan or at a renewal threshold and to establish a minimum loan term of 14 days.



INFRASTRUCTURE DEVELOPMENT and SECURITY

Mobility and Access through Funding Innovations

During the interim, the Senate Infrastructure Development and Security Committee (IDS) reviewed the effectiveness of H.B. 3588, the omnibus transportation bill passed during the 78th Legislature, Regular Session, to address the state's growing problems with traffic congestion due to the tremendous population growth in the state. Article 2 of H.B. 3588 authorized regional mobility authorities (RMAs) to issue revenue bonds, establish tolls, and convert segments of the non-tolled state highway system to turnpike projects. The Texas Transportation Commission (TTC) subsequently approved RMAs in Bexar, Cameron, Grayson, Smith/Gregg, Travis, and Williamson counties.

A number of issues have arisen as a result of RMAs that relate to geographical jurisdictions and the operation of other transportation entities, including mass transit. Legislation may be considered that would allow an RMA to develop public transportation systems within its geographical jurisdiction by entering into a voluntary agreement. According to TTC, amending state law would allow RMAs to have the capacity to develop regional public transportation strategies, including rail, toll, non-tolled, public, and federal in a region's transportation strategic planning.

The Texas Mobility Fund

The Texas Mobility Fund (Mobility Fund) has established the framework for distributing \$3 billion in new transportation funds by accelerating previously requested, local projects as identified in the Texas Department of Transportation's (TxDOT) Statewide Metropolitan Mobility Plan in order to help "bridge the gap" between a region's needs and the necessary financial infrastructure. While the Mobility Fund is to be leveraged with toll projects and private funds, legislators may consider redirecting funds from motor vehicle certificate of title fees, motor carrier permit fees, overweight truck fees, defensive driving fees, and fees from personalized license plates, to generate additional revenue for the Mobility Fund. This could redirect approximately \$400 million in annual transportation-related fees from General Revenue to the Mobility Fund.

The 79th Legislature may consider TxDOT's recommendation that the statutory cap on toll equity on funds from the State Highway Fund be eliminated as the movement toward toll roads continues.

Surplus toll revenue from a TxDOT turnpike project—revenue above what goes toward debt, operations, and maintenance—may only be used to pay for another turnpike project

in the region. This surplus cannot be used on a non-turnpike project in the region and legislators may consider proposals to change this restriction.

The legislature may reexamine the cap of \$12.5 million per year for certain rail purposes on non-Trans Texas Corridor rail projects. Additionally, the 79th Legislature may reexamine the \$25 million per year cap in expenditures for Trans Texas Corridor rail projects. The low bid process is also considered by some to be a barrier to planning for a multi-modal transportation network and may be examined by legislators.

Legislators may consider promoting rail transport for both commuter and commercial cargo; establishing connections to regional airports; or encouraging the diversion of the North American Free Trade Agreement (NAFTA) related truck traffic to rail freight in order to alleviate congestion on highways and the border.

The 79th Legislature may also examine amending state law to allow pass-through toll financing agreements with local public or private entities to increase financial leveraging for implement transportation projects.

Article 1 in H.B. 3588 authorized TxDOT to enter into comprehensive development agreements (CDAs) for the development of one or more facilities that are part of the Trans Texas Corridor. Article 15 of H.B. 3588 authorized TxDOT to enter into CDAs with regard to turnpikes.

In order for TxDOT to continue utilizing CDAs, the elimination of the Sunset Advisory Commission's provision for their expiration in 2011 would need to be addressed. Additionally, the legislature may consider the usefulness of CDAs, not only for toll projects, but for other state projects as well.

Statutory Changes to Assist in Alleviating Congestion

Land acquisition and right-of-way issues may be addressed by the legislature as a means of ameliorating problems associated with land purchase for roads in highly congested areas. Early acquisition of property from willing sellers in order to set aside land for potential corridors was authorized under provisions in H.B. 3588 as a means of keeping land acquisition costs stable, whether in rural or highly congested metropolitan areas.

Additional remedies legislators may consider for controlling the costs associated with purchasing land may include allowing counties to enter into agreements with TxDot for the purpose of allowing counties more control over development where new highways will be constructed in order to limit speculation.

Trauma Care under Article 12, H.B. 3588

The legislature may review the use of trauma care funds derived from fines from legislation passed in the 78th Regular Session (H.B. 3588) to determine whether the funding has adequately addressed services related to trauma care, another unintended consequence of urban growth. The funds are collected by the comptroller. When and if they reach \$250 million, the excess funds are to be directed to the Texas Mobility Fund.

The legislature may also consider extending the current expiration date of September 1, 2007, for this revenue stream.

Proof of Financial Responsibility

The current Uninsured Motorist Rate (UMR) in Texas is estimated at 20 percent. H.B. 3588 charged the Texas Department of Insurance (TDI) and the Texas Department of Public Safety (DPS) to jointly conduct a study to determine the feasibility, affordability, and practicability of using a database interface software system for the verification of liability insurance coverage on motor vehicles in Texas.

The following report, just issued, *H.B. 3588 Feasibility Study of an Interface Motor Vehicle Financial Responsibility Verification System* (2004), found that the implementation of a database reporting system could result in some reduction in the UMR rate; however, the task force indicated that this approach alone would not be a sufficient rationale to implement the database.

The task force recommends that Texas not implement a database interface system at this time due to several factors, most importantly that of cost.

The report states that while funding was originally provided for implementation of the system under H.B. 3588, with authorization for funds to conduct the feasibility study authorized with the passage of H.B. 2, 78th Legislature, Third Called Session, the revenue generated by the \$1 fee assigned to vehicle registrations in H.B. 3588 was also dedicated to the Driver License Reengineering Project (DLRP).

The program does not provide sufficient revenue to fund both DLRP and an insurance verification program.

The task force recommends issuing a Request for Information (RFI) that would address specifically those features necessary for a database interface system as well as costs and construction.

The 79th Legislature may consider statutory authority and funding to implement a system that combines the benefits of instant verification through industry databases with the monitoring of identified uninsured motor vehicles.

Homeland Security

Initiatives for threat assessments, targets, and federal funding are issued from the governor's office of Texas Homeland Security and include educational training for possible bioterrorism attacks through the Texas Department of Health and other state agencies and educational institutions. The Texas Engineering Extension Service (TEEX), part of the Texas A&M University System, has been granted \$20 million in homeland security funding, part of the \$33 billion approved by the United States Congress and President Bush for federal fiscal year 2005 homeland security funding. This funding will train emergency workers, or first responders, including police officers, firefighters, and government employees, to react to biological weapons attacks and related terrorism acts. The legislature may review funding needs in the areas where there may be some reduction of federal funding of public health, hospital preparedness, or other unidentified state needs. Additionally, the legislature may review their ability to track funding to determine the efficiency of allocated needs.

Consular identification cards, or "matricula consular" cards, may continue to be an issue as legislators consider the implications that acceptance of such cards has on the state and at the local level, particularly as to federal immigration policy and homeland security. The 79th Legislature may consider allowing residents who are not citizens to have a form of identification, either a driver's license or a matricula consular identification card, for business and government transactions.



STATE AFFAIRS

Elections

The federal Help America Vote Act of 2002 (HAVA) established a program to provide funds to states to replace punch card voting systems, created the Election Assistance Commission to assist in the administration of federal elections, and established minimum election administration standards for states and local governments for the administration of federal elections. H.B. 1549, enacted by the 78th Legislature, Regular Session, made changes in Texas election law to comply with HAVA. The issue of using direct recording electronic voting machines (DREs) has generated a lot of discussion. Supporters assert that DREs are cost effective and efficient, secure, and make it possible for many disabled persons to vote without assistance. Opponents assert that DREs are untested and vulnerable to tampering; they argue that there must be stricter standards regarding security and verifiability and any implementation of DREs must be accompanied by a verifiable paper trail. However, requiring such a paper trail increases costs and administrative complexity. The legislature may examine how well the state's voting system performed during the 2004 elections and consider whether to require changes or improvements.

Nursing Home Liability Insurance

The affordability of mandatory liability insurance in the nursing home industry is an issue that will confront the 79th Legislature. Although there has been some increase in the number of companies writing professional liability coverage for nursing homes, and insurance rates have stabilized in response to tort reforms enacted by the 78 Legislature, Regular Session, many nursing homes are still without coverage or must be insured by the Joint Underwriting Association (JUA), a non-profit association that serves health care providers who cannot find affordable insurance through the commercial market. One problem is that, compared to the insurance market for physicians and hospitals, this is a very small market, and there is not a lot of competition. The insurance rates are still high and many small, nonprofit, rural, or church-run nursing facilities cannot afford coverage.

The 77th Legislature, in response to rising liability insurance rates, enacted S.B. 1893, which gave for-profit nursing homes access to JUA, provided for the development and adoption of best practices in nursing homes, and required nursing homes, in order to be licensed, to maintain professional liability insurance coverage in the annual minimum amount of one million dollars per occurrence and three million dollars aggregate. This mandatory insurance requirement was repealed by the 78th Legislature, Regular Session, and the 79th Legislature may consider reenacting some sort of mandatory minimum coverage.

Arbitration

The Federal Arbitration Act (FAA) provides that a written contract for transactions involving commerce which requires the parties to agree to arbitration of any controversy arising out of that contract is valid and enforceable. An expanding definition of what constitutes a transaction involving commerce has resulted in more transactions falling under FAA, and in recent years there has been an increasing use of mandatory arbitration clauses in consumer and employment contracts. Businesses argue that arbitration is an efficient and cost effective alternative to litigation, results in faster resolution of disputes and, by avoiding frivolous lawsuits and runaway jury awards, helps keep down costs for consumers. Opponents to such clauses assert that these contracts are written by the seller or employer, and the consumer or employee is unfairly forced to agree to these clauses on a "take it or leave it basis." Such arbitration clauses, opponents argue, may place unfair limitations on remedies, charge unreasonable fees, give the seller or employer too much power in choosing the arbitrator or location of the arbitration, and, even if the consumer or employee is successful, may be expensive to enforce. The use of arbitration clauses by homebuilders in Texas has become an issue because of the creation of the Texas Residential Construction Commission (TRCC), created during the 78th Legislature, Regular Session, to help resolve conflicts between contractors and homeowners in a cost-effective and expedient manner. Consumer representatives have asserted that the composition of TRCC's arbitration task force is heavily biased in favor of homebuilders.

Although federal preemption by FAA limits the states' ability to prescribe the use of arbitration, the legislature could consider enacting laws ensuring that arbitration is fair to all parties; suggestions include establishing maximum fees, requiring arbitration in the consumer's or employee's county of residence, setting standards and qualifications for arbitrators, regulating the methods of selecting arbitrators, and allowing arbitrators to limit discovery. Courts may review and overturn an arbitration decision when an arbitrator has acted with manifest disregard for the law; another suggestion is that the legislature statutorily define what constitutes such manifest disregard.



SUNSET REVIEW

The Sunset Advisory Commission (Sunset) reviewed 29 entities scheduled for consideration by the 79th Legislature. The Sunset process provides for the examination of state boards, agencies, and commissions in order to determine their efficacy in carrying out their missions. Sunset legislation for the following entities may be considered:

Texas Optometry Board
Texas Guaranteed Student Loan Corporation
Texas State Board of Examiners of Professional Counselors
Texas State Board of Examiners of Dietitians
Texas State Board of Examiners of Marriage and Family Therapists
Texas Midwifery Board
Texas State Board of Examiners of Perfusionists
Texas State Board of Social Worker Examiners
Texas State Board of Medical Examiners
Texas State Board of Physician Assistant Examiners
Texas State Board of Acupuncture Examiners
Texas Board of Chiropractic Examiners
Texas Lottery Commission
Texas Alcoholic Beverage Commission
Texas Education Agency
State Board for Educator Certification
Regional Education Service Centers
Windham School District
Public Utility Commission of Texas
Office of Public Utility Counsel
Electric Utility Restructuring Legislative Oversight Committee
Telecommunications Infrastructure Fund Board
Texas State Board of Barber Examiners
Texas Cosmetology Commission
Texas State Board of Pharmacy
Texas Workers' Compensation Commission
Texas State Board of Veterinary Medical Examiners
Texas State Board of Examiners of Psychologists
Texas State Board of Podiatric Medical Examiners